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THE NURSING LAW : AN OVERVIEW

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ABSTRACT

The hospitals provide medical service to the patients. The doctors provide consultation to the sick persons and, if necessary also perform surgery. But the entire responsibility of looking after the indoor patients is of the nurses. They work round the clock every day. Thus the nurses hold an important position in med-care of the patients. They have to work according to the Oath they have taken and the nursing law and rules and regulations framed from time to time. The medical service providers, including the nurses, have hardly exposed to the education of nursing law. The Nursing Council, the Nursing Association, the educational institutions and the other stake holders including the Law Schools have left this field neglected.

The present Paper tries to cover a critical review of the Supreme law, the Constitution of India, the nursing law and other the laws related to nurses and tries to find out their direction. The nurses' services along with other medical service providers have attracted a large number of litigations. An examination is also made in this Paper to find out what has been the contribution of the dispute settlement mechanisms. The main focus of this Paper is to evaluate the question: have the law and such mechanisms done justice or injustice to the nurses? Finally the paper will close with the answer to the question: What we need now?
Key words: Medicare, Nursing Council, Negligence, Frivolous litigation, Compensation.

INTRODUCTION

I . PROLOGUE

Nurses hold an important position in the medicare system. Their services are available round the clock for twenty four hours for 365 days. There is no other profession where a person puts in such a dedicated, committed and honest services. The question is: have we recognized their services? Have we given them their due status, benefits and privileges? The answer cannot be in positive. These are the main questions the legal pandits have yet to give a clearly answer. And therefore, this remains a barren field not explored by researchers. The present paper will try to investigate and find out as to how successful the public health system may be available to the people in this regard. To answer these questions, an overview attempt will be made to focus on the nursing law and to find out what have been the laws' directions and the judicial approach in this field. This will give the nurses and the stake holder's awareness about their legal positions and the rights, duties and responsibilities.

Neither the Council nor the nursing institutions and unfortunately the legal pandits have not contributed much in this matter. The present paper makes an attempt to critically analyse the provisions from the Supreme Law down to the specific law and the related laws. An examination will also be made to find out whether any reform is needed. The courts and, in particular, the consumer forum have been flooded with the litigations against the nurses. An humble attempt will be made to find out how remedial machineries have duly helped the patients and also allowed the medical service providers, nurses, to perform their duties freely without any fear and in the best possible manner. This will allow nurses to abide by the Nightingale's oath and able to set an example of their success story in the medicare industry.

II. THE LAWS' VISION

1. CONSTITUTIONAL DIRECTIONS

All the professions are subject to the provisions of

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the Constitution of India, and the nursing profession is no exception. On the one hand, it guarantees the fundamental rights to carry on any profession. Thus the people involved in nursing profession also get this right. The medical institutions, Governments and other authorities cannot take away or abridge their right. However, the state is empowered to impose any restriction on such right provided that it is in the interest of general public and reasonable or subject to any professional qualification to practice such profession. Further this right is also subject to the Fundamental duties which include to promote harmony and the spirit of common brotherhood amongst all the people, renounce practices derogatory to the dignity of women, develop humanism and most importantly, strive towards excellence in all spheres. The State is also under fundamental obligation to raise the level of nutrition, standard of living and to improve public health. Thus this forms a constitutional Triveni Sangam for all the stake holders including the nursing staff.

2. NURSING LAW

A. Specific Laws

Coming to the legislative power with respect to the medical profession which also includes Nursing profession, Parliament and the State Legislatures both or either of them may exercise concurrent power in this regard, in List III, entry 26 of the Seventh Schedule to the Constitution. However, before the Constitution came into force, the UK Parliament, in order to establish a uniform standard of training for nurses and other para-medical workers, came out in 1947 with the legislation titled as the Indian Nursing Council Act, 1947. This Act of 1947 has been amended by the India Parliament time and again from 1950 to 1986. The source of legislative power being concurrent, the Act in section 2(c) authorizes the State by law to constitute a State Council; there are nearly 15 States where the State nursing legislations have been in operation. In order to maintain uniformity in the State Nursing Laws, either there should be an umbrella legislation of Parliament.

The Act of 1947 primarily deals with two broad provisions: one, the constitution of the Council; and two, the powers and functions of the Council. Section 3 of the Act authorizes the Central Government to constitute the Council. It is submitted that when it is constituted by the Central Government, the Council should have been named as the Central Council to avoid any confusion with other councils. The composition has been made not only complicated but it has also a huge battalion of members, consisting of roughly 80 divided into three groups: elected members, ex-officio members and nominated members. The largest number is of elected members, followed by the ex-officio and only four members are to be nominated by the Central Government. There are members from nurses, midwifery and matron, members of Parliament elected by Parliament Chief Medical Officer, Superintendents of nursing services, Indian Medical Association, etc. Will such a large body produce any fruitful result? Will not there be a number of vacancies in future in view of the delay in their elections? How far such persons may successfully help in the deliberations on policy decisions of the Council? Should politics be brought in the Council's functioning? It is suggested that select stake holders involved in policy and planning in this regard should compose the Council. Furthermore, when the election or nomination of the members is delayed then the ex officio members will hold the ground, making till then the Council too bureaucratic to function.

If there occurs any vacancy in such membership, the freshly elected or nominated member shall hold the office for the reminder period of the vacant seat. There is unfortunately no provision in the Act providing for the removal of any such member. Thus the Central Government or any other competent authority will have no power to remove any member if he or she is adjudged guilty in cases of misbehavior, corruption, misuse of the office or any criminal offence etc. The other provision which attracts attention is that a member shall be eligible for re-election or re-nomination. Such provision will restrict the entry of young blood and allow the existing member their monopoly in the Council.

In order to look after the executive functions of the Council, the Council may constitute an executive committee to perform such duties as the Council may confer or impose through the Regulations. Section 13 confers the power on the executive committee to appoint inspection team to inspect any institution training and holding examination for nurses with respect to the adequacy of training and sufficiency of examination. The report of the inspectors shall be forwarded by the committee to the concerned institute, the Central Government, the concerned State Government and the Nursing Council of the State. The report is very important to decide the fate of qualification and the institution. It would have been better instead of the Central Government the national Council should have been involved in

this matter rather than giving no place to it in this regard. It is not a secret that the inspection teams on many occasions were involved in corruption, making it a business. Should inspection be done every year or once a clean chit is given then the inspection be done after five years unless complaints are received against the institution?

The Act unfortunately does not specifically provide the functions and powers of the Council for which the legislation is enacted. According to the scattered provisions in the Act the functions may be categorized into three: recognition of qualifications; withdrawal of recognition; and requiring information.

a. Recognition of qualifications

Regarding recognition of qualifications, the Schedule to the Act is divided into two parts: Part I provides the list of recognized qualifications for the general nursing, midwifery, auxiliary nursing and midwifery and health visitors of the institutions. Part II provides the list of recognized higher qualifications and the connected names of institutions thereto. Further the Council is given power under section 10(2) to recognize any other qualification which is not included in the above Schedule on the recommendation of any competent authority of the State. As per section 10 (3), the Council may enter into negotiations of reciprocity for recognition of qualifications with any authority either the within territory of India to which the Act does not extend or any foreign country. Such qualification shall be considered as the recognized qualification for the purpose of this Act. Such reciprocity agreement will allow any nurse and other paramedical persons to practice in and outside India.

A citizen of India, having registered with any nursing council of any foreign country, can be enrolled in State register in India with the approval of the Council. In case a person is not a citizen of India, he/she may be enrolled in the State register with the approval of the President of the Council. Such a person may work for the period approved as a nurse, midwife, auxiliary nurse-midwife, teacher or administrator in any hospital or institution situated in any State for the purpose of teaching, research or charitable work. Such work, according to the Act, shall be limited to the hospital or institution allowed to be attached. Thus the legislation makes a limited operation for such a person and deprives other institutions of his/her services within the prescribed period.

Section 14 empowers the Council to withdraw the recognition in two cases: one, if the courses of study, training and examination are not in conformity with the Regulations made under the Act or it falls short of the standards required therein. And two, if the institution, recognized by the State Council, fails to comply with the requirements of the Council. All the declarations of withdrawal of recognitions shall be passed by the Council and accordingly the Central Government shall by notification in the official Gazette amend the concerned Schedule. The pity is that the culprits are hardly booked and the result is there is a mushroom growth of such institutions, throughout India, an easy money making market.

b. Nurses Register

The State Council is required to maintain a State register of nurses, midwives or health visitors as required under the State law in this regard. Every State is required to supply to the Council, twenty printed copies of the State register as soon as may be after the April 1 of each year. Correspondingly, a new provision is added by the Amendment Act of 1958, which authorizes the Council to maintain the Indian Nurses Register with the names of all persons who are for the time being enrolled on any State register. It is the duty of the Secretary of the Council to keep the register up to date. Such register, according to section 15A(3), shall be deemed to be a public document within the meaning of the Evidence Act, 1872.

c. Information to be provided

Section 12 requires every authority of the State, which grants a recognized qualification or higher qualification, shall furnish to the Council such information as it may require from time to time as to the course of study, training or examination to be under gone to obtain such qualification. If the authority of the State fails to provide such information then the Council is empowered under section 14 to withdraw the recognition. Unfortunately the Act is silent about the penal action to be taken in case of continuous non-compliance of the above requirement by the concerned authority, institution or person concerned. There are private medical hospitals and institutions where nurses without recognized qualification are performing their duties. There has been an increase in the demand of nurses within and outside the country. This has led to growth of nursing training institutions without the required infrastructure. Though Section 13 talks about inspection of any nursing training institutions, it has yet to ren-

der fruitful results. Should the Centre depend in this regard on the individual approach of the State under their laws or a centralized uniform action is the need of the time?

d. Regulatory Power

Section 16 confers the power on the Council to make Regulations. Neither such power is given to the Central Government in this regard nor does the Act anywhere specifically allow its interference or control on the Council by the Government. Thus the Act makes the Council the super-authority created by law to deal with the nursing profession. Thus in the federal country, a unitary approach is adopted. There are ten items over which the Council may make Regulations. These matters, for example, include, seven matters related to management, administration and working of the Council. Apart from these, the section also provides for the prescribed standard curricula, examination and conditions for admission to the nursing training programme. In the regulation, no provision is kept for the so called Central Council to supervise the functioning of the State Councils. Further, Section 16 (j) confers on the Council, the residuary regulatory power on any matter not prescribed in the Act. In order to avoid litigation, this sub-section could also have been given ancillary and incidental power to the Council with respect to subjects specified in the Act.

The regulations made by the Council, requires under Section 16(3), inserted by the amendment Act, 1986, to be laid as soon as before each House of Parliament. Both the Houses of Parliament may make any modification or disagree with any Regulation so made. This is a unique legislation where the regulations are submitted to the highest law making body in India. It is a million dollar question, will the Members of Parliament have time to go through the Regulations or as usual it will be deemed to have been seen? It would have been better if such Regulations may be sent to the Central Government having the power to modify or reject them.

The Act misses one important provisions of authorizing the Central Government to make rules in this regard. The rules so framed by the Central Government then could be tabled in both the Houses of Parliament. And after such provisions would come the provisions dealing with regulation making power in the Act. This is the normal sequence of setting of any section in the legislation. Even the Indian Medical Central Council Act, 1970 provides in this regard. Further, in order to put a control on the power of the State to grant or refuse permission for the establishment of a new nursing training intuition, a provision could have been provided in the Act in this regard. The Council, if satisfied, may reverse the decision of the State Council. Furthermore, there could have been a provision for the removal of name of any nurse from the Indian Nurse Register on the ground of having no prescribed recognized qualification or an act of grave misconduct by the person concerned. The Council may take action in this regard in consultation with the State Council.

B. Select Nursing Related Laws

There are many laws governing directly or indirectly, the nurses for example, the law of contract, labour law, family law, code of conduct, general medical jurisprudence, etc. However, the two laws which have specifically attracted the attention of the stake holders the courts are the criminal law and the consumer law.

1. Criminal Law

The normal plea taken on behalf of the patients before the court is about the negligent conduct, murder or culpable homicide, grievous hurt, wrongful restraint and confinement, sexual harassment and other sexual offences, breach of contract to supply wants to the helpless sick person, etc. Out of these offences, the offences which have mainly attracted the attention of the Courts are; murder and negligent act. However, these criminal suits are filed for imposing only criminal liability and therefore, this remedy generally is not taken help of as it has no compensatory output. And therefore, in this field, the law of torts plays an important role.

According to section 300 of the Indian Penal Code, an act which causes:

a. Death

b. The offender knows that it is likely to cause death

c. The injury caused is sufficient to cause in the ordinary course, death

d. The act is imminently dangerous to cause death, there it amounts to murder.

However, such an act will not be murder if the offender was:

(i) Deprived of the power of self-control due to grave and sudden provocation; in good faith

(ii) Exercised his right of self-defense in good

faith beyond the power given by law.
(iii) A public servant, advancing public justice in good faith, exceeded his power given by law.
(iv) In heat of passion upon sudden quarrel without the offender acting in an unusual manner.
(v) Of the age of eighteen years, who consented for his own death

It may be pointed out that so far as the nurse and patient relationship is concerned, the above exceptions generally have no place in a criminal suit for murder. If a nurse follows a procedure or treatment with the intention to kill the patient resulting in his death, it will amount to murder. However, such cases in medical history are rare of rarest cases. There are two more rubrics of murder: the intentional act which causes in ordinary course, death or it is so imminently dangerous to cause death. The punishment for such an act is either death or imprisonment for life and also fine. Such punishment has hardly found any place in nurse-patient relationship.

An important section 304A was introduced by the Amendment Act of 1870 which deals with 'causing death by act of negligence'. Here the offender without any intention or knowledge causes the death of other person by rash or negligent act, will attract the punishment of either description for a term which may extend to two years, with fine, or with both. What is a negligent act is not defined under the Act; however, the Supreme Court has now been taking a stand that the negligence must be 'gross or of a very high degree'. For example, a nurse administered wrong blood to a patient in the ICU fighting for life and death and it resulted in his death or such a patient was left unattended by the nurse for two hours who in between dies.

There are other provisions dealing with rash and negligent act[1] . In all these cases, the hurt or grievous hurt must endanger human life; however they are silent about its result. These sections do not require intention or knowledge; as such the punishment in these cases is liberal. In case of hurt, the punishment shall extend to six months imprisonment& fine extending to five hundred rupees. But in case of grievous hurt, it attracts maximum imprisonment of two years and/or fine of rupee one thousand.

2. Consumer Law

The consumer law is enacted to protect any person for the present reference, from malpractice, inaction, miss-action or deficiency in services. Parliament passed the Consumer Protection Act, 1986 and in course of time the Central and State Governments made Rules in this regard. The following are the important provisions which will also apply in cases of nurses.

(i) Consumer

Section-2 (1) (d) defines a consumer broadly to mean a person who hires or avails of any service for consideration. If honorary services are rendered, the present legislation will not apply. A consumer may be a natural person or an artificial person who hires or avails of any service. An association may be a person provided that the individual members are consumers, having a common cause of action.

(ii) Service

Section 2 (1) (d) defines service to mean service of any description which is made available to potential users. This section further provides by way of illustration and not an exhaustive list of eleven services which unfortunately miss medical services. However, it excludes services rendered free of charge and services rendered under a contract of personal service. Further, section 2(1) (g) defines 'deficiency' to mean any fault, imperfection, shortcoming or inadequacy in the quality of service. Thus the legislation protects the consumer against deficiency in service which is hired or availed. Any deficient in service rendered by the other person, including the nursing staff, will attract the provisions of the Act. This will mean that failure on the part of a nurse to take a reasonable degree of care or handling the patients' case without any skill or knowledge will be considered as deficiency in service.

(iii) Rights of the Consumers

Sections 6, 8 and 8A enumerate certain rights of the consumer which includes right to:
a) protection against services which are hazardous to life;
b) information about quality, quantity, potency, purity and standard of services;
c) access to a variety of services at competitive prices;
d) due hearing at appropriate fora;
e) seek redressal for exploitation; and
f) Consumer education.

However the legal awareness of the rights and duties of the nurses is the need of the time[2] .

1. See section 336, 337 and 338.
2. S. H. Sharmil, Awareness of community Health Nurses on Legal Aspects of Health Care, Intl. Jou. Of Public Health Res., 199-218, 2011. See also H. Kumar, et al Legal Awareness and Responsibilities of Nursing Staff in the Administration of Patient care, 2013.

In order to protect and promote these rights, Consumer Protection Councils are created at three levels: Central, State and District levels. Whatever the output of these Councils, one thing is clear that looking to the flood of litigation before the redressal agencies; they have yet to perform their due role.

(iv) Redressal Agencies

In order to provide speedy and simple redressal to consumers` disputes, the Act provides three tier redressal agencies: the District, State and National machineries. The District forum may be activised if the value of services and compensation does not exceed rupees twenty lakhs[3]. Any person aggrieved of the order of the District Forum may appeal to the State Commission within a period of thirty days from the date of the order[4] . The State Commission shall have jurisdiction to entertain a complaint if the value of services and compensation does not exceed rupees one crore or allow appeal against the order of the District Forum[5].The final redressal agency in the Act is the National Commission which shall have jurisdiction to entertain complaint where the value of services and compensation, if any claimed, exceed rupees one crore or appeal against the order of the State Commission[6] . And lastly any person aggrieved of the order of the national Commission may prefer an appeal to the Supreme Court of India within thirty days from the date of the order[7] . The fora may award compensation, and/or adequate cost to parties. If a person against whom an order in issued, fails to comply with the same, such person shall be subject to punishment which shall include imprisonment of minimum one month but not exceeding three years or a fine of minimum two thousand but not exceeding ten thousand rupees or both[8] . A person, in order to get justice from the final redressal agency, may with inflated claim of compensation, directly go to the National Commission. It is suggested that the Commission must be given only the appellate jurisdiction. This will reduce the load of the apex body in the Act and allow the right of the consumers to get speedy justice.

III JUDICIAL RESPONSE

Nurse individually or jointly with the physician or surgeon or hospitals have attracted large number of litigations. These litigations were taken to the subordinate, high Court and in appeal to the Supreme Court. There were a large number of cases which were taken to the consumer forums. These litigations for example, included, working condition, wages, promotion, qualification, registration, and dereliction of duty, violation of ethics, irregularity and mismanagement in the standard of nursing care, failure to abide by orders of doctors, etc.

The following are some of the selected cases on nurses' negligence which throw light on nurses functioning, medicare and more particularly abiding by the oath they have been administered:

1. Negligence

Out of the nurse litigations, cases pertaining to the negligence of nurses have attracted maximum attention of the judiciary and the Consumer forums. The present paper confines discussion on only select cases relating to negligence of nurse in performing their duties. Negligence may be per se negligence, active, passive and negative negligence. It may be simple negligence or gross or hazardous negligence. To compensate the loss due to minor omission or major dereliction of duty, the patients or their relatives or guardians have knocked the doors of the dispute settlement machineries. The diseases of ambulance chaser of the western countries, and in particular, USA, is also finding its place in the Indian medicine system where the middle men, at a settled price, provoke the alleged victims of medical negligence to help in initiating legal proceedings against the hospital employees and hospitals. The result of flood of litigation has been that the nurses work under pressure, strain and fear of litigation. Will this not affect the nurses' capability and capacity in rendering medicare? In a large number of cases, the victims have preferred to reach out to the consumer forum for redressal for reasons: one, there is not much undue delay in getting justice; and two, it can be easily and cheaply accessible.

The first question is when negligence actionable? If a medical service provider fails to exercise reasonable skill and care that will be an act of negligence [9]. However, the courts, generally, do not require either the very highest degree or a very low degree of care and competence. What is required in the words of Mc Nair J. "(I)t is sufficient if he exercises the ordinary

3. Section 11.
4. Section 15
5. Section 17.
6. Section 21.
7. Section 23.
8. Section 27.
9. *Laxman Joshi v. Trimbak Godbole,* AIR 1969 SC 128; I*ndian Med. Assoc. v. V.P. Santha,* AIR 1996 SC 1995.

skill of an ordinary competent man exercising that particular act"[10] . No fixed criteria can be prescribed or a medical formula can be laid down to determine actionable negligence. It will depend upon circumstances of each case. However, a simple error in judgment will not attract action for negligence. Lord Denning rightly pointed out that it is generally not an actionable negligence [11][if doctors, like the rest of us, have to learn by experience, and experience often teaches] in a hard way. Something goes wrong and shows up a weakness and then it is put right. [12]

The result of unnecessary dragging the doctors is what Lord Denning clearly and rightly pointed out : Experienced practitioners are known to have refused to treat the patients for fear of being accused of negligence. Young men are even deterred from entering the profession because of risk involved. This analogy with reference to the doctors will equally apply to the nurses.

2. Wrong Prescription

It is the fundamental duty of a nurse to provide adequate service to the patients. This is one of the oaths she takes when she enters the temple of learning. In view of the working conditions, environment in which he/she works and the facilities and privileges provided to her, often a nurse is prone to commit mistakes. It may be a minor or negligible mistake which may not attract any legal action. If it is serious or grave resulting in serious harm, long time to recover, or the remains in a vegetative life or even causes in some cases, death, it will attract criminal or civil action. Following are some of the cases where actions were initiated either against the nurse personally or the treating physicians surgeons and/or the hospitals.

The *Harjot Ahluwalia* [13] case is important case which saw a long journey from District Consumer Forums, State and National Commissions and finally the Supreme Court of India. In this case, the doctor advised the nurse to give chloroquine injection but the nurse believing that the patient had been taking Lariago syrup advised the father of the patient to get Lariago injection. She without testing the sensitivity of the child to the drug gave Intra Venous injection which resulted in cardiac arrest and finally repairable brain damage. The District Forum and the State Commission held both the nurse and the doctor liable for negligence. It was brought to the notice of the court that the nurse handling the case was not qualified and still the hospital had appointed her. The apex court adjudged the doctor and Hospital guilty of such negligence. It imposed heavy amount of compensation to be awarded to the deceased boy for his pain and suffering and also the parents for the care of the boy in a vegetative state. It is unfortunate that the major culprit, the nurse who was directly involved in this case went scot-free. On the contrary if a nurse is not qualified and still performs functions, it was held a clear case of negligence [14] . The hospital, as the employer, was also held liable when a nurse gave Diazapam IV (Intravenous) injection instead of Intramuscular which resulted in serious consequences. It is duty of the nurse to follow the instructions given by the doctor [15].

3. Careless Medicare

How careless a nurse can be, it can be seen from the *Bhajanlal case* [16], where the patient was suffering from a disease needing polyradiculoneuropathy to be continue but the nurse failed to notice the disconnection of oxygen tube resulting in cardiac arrest. Instead of an individual's recklessness, the Forum held the hospital vicariously liable. Furthermore, the nurse in place of carbonate mixture administered carbolic acid the National Commission treated at it as a simple mistake, and therefore not actionable.

For subsiding pain, an analgesic drug is a good remedy. This fact even a common man knows. But a trained and qualified nurse gave fancuran injection in place of analgesic. The result was that the patient got muscle paralysis and finally died. Fortunately in this case, along with the doctor and hospital, the nurse was also held guilty [17]. Sometime a nurse me may be involved in adventure either to become hero [18] or extract money and may take on her own, the management of a case of delivery which resulted in rupture of the uterus finally and the death of the child which attracted vicarious liability [19].

10. *Bolam v. F. Hosp.* (1957) 2 AII.E.R. 118, 121.
11. White House v. Jordon, (1981) 1 AII.E.R. 267 (HL); see also *Roe v. Min of Health*, (1954) 2 All.E.R. 131. But this opinion has been modified in *Bolitho v. City & Hackney* H.A., (1997) 4 All.E.R. 771. It is also critised as no defence in suit for negligence. See, Michal A. Jones, Medical Negligence, (2nd Edi), 76-77, 1996.
12. White House v. Jordon (1980), All.E.R. 650, 658
13. Spring *Meadows Hosp. v. Harjot Ahluwalia*, AIR 1998 SC 1801.
14. L. D. Bajaj v. Hari Chand, 2003 (1) CPR. 328
15. Bholi Devi v. State of J & K, AIR 2002 J & K 65, where the court took stand that all the employees perform for the hospital, the hospital is liable for its employees' acts. See also Joseph v. George, 1994 (1) KLJ 782.
16. *Bhajanlal v. Mool Chand Hosp*., 2001 (1) CPJ 31 (NCDRC)
17. Sudhakar v. Gauri Hosp., 2004 (1) CPJ 329 (AP SCDP)
18. See the *heroic act in People v. Angelo*, 8 Nys 2d 217, where the nurse gave injection of lathel drug to several patients who was awarded 50 years imprisonment. See also *People v. Diaz,* 834 P 2d. 1171 (1992). In all these cases, fortunality the nurse was held individually guilty.
19. *M. Jeeva v. R. Lalitha*, 1994 (2) CPJ 73 (NCDRC).

A nurse in order to earn extra money also looks after the patient privately. A doctor suggested a patient to do exercises. A nurse was privately engaged for this job. While helping the patient, she caused fracture to femur and pelvis[20]. The complaint was lodged against the doctor. However, the nurse was not made a party and therefore, she was not held liable. From this case and the other cases of lapses of nurses, the claimants have gone against the doctors and/or hospitals in view of the capacity to pay and culprit nurses are left without any action. For any serious lapse of the nurses should the Forum or Court not direct to the Nursing Council to take action against them? It is here what the court orders will make the Council responsive on this dormant front.

In this series, the Dilbaugh case is interesting. In this case, the nurse presenting herself as a doctor handled independently a complicated case of delivery causing danger to the life of the patient. She pleaded in her statement that no operation was done by her but the stitches proved her false plea. She was held liable for the death of the patient.

How can a nurse be careless in her medicare for a patient is exhibited in a case [22] where the child, after operation for right inguinal hernia, was recommended a hot water treatment to his leg. The nurse, without caring for the temperature of the hot water put the extremely hot water bag under the child's leg which got badly burnt. Here, the hospital was made vicariously liable. A nurse, manipulating hospital records to shield her guilt, was held liable [23] .

In this regard, the *Surinder Kaur* case [24] of interest. Where in order to help an accused, the doctor and the nursing staff tempered with the medical record. Unfortunately instead of taking the help of the IPC, unsuccessfully the case was brought under the Prevention of Corruption Act. A nurse is supposed to perform her duty as per time scheduled. A nurse left early without waiting for the reliever nurse to join duty. Even the reliever nurse was late. In between, a serious patient who was left unattended ultimately died. Nurse, doctor and hospital were held vicariously liable [25]. Further there are cases where a nurse has to work under patient's pressure but in spite of this she performs duty satisfactorily, it was held that there was no question of any negligence [26].

4. Application of Independent Mind

The *Sudhakar* [27] and *K. G. Krishna* [28] cases have raised an important issue. What will a nurse do when the nurse feels that the doctor's prescription is either adequate or wrong? In the United States, the court requires the nurse to consult the concerned physician in such cases. If the nurse did not ask the concerned physician, and administered drug on her own, she was held guilty [29]. However, in the *Berdyak case* [30] the Ohio Court has taken a different approach. If the prescribed treatment by the doctor was inadequate or improper, a nurse can perform function with her understanding with ordinary care and skill required by the relevant standard of care. Further, the California Court has taken a stand that if the prescribed drug, according to the nurse is dangerous to be administered, and then she may not carry out the prescription of the doctor [31]. In India in the above case, no independent mind of a nurse is allowed. However, there may be a grave emergency and in such a case if she manages the case well, she, will not be held guilty. The Poland law in Article 21 requires that in case the consencious of a nurse says that it is wrong to perform medical procedure prescribed by the doctor, she can adopt her independent decision provided that she has informed the senior. Even the South Africa law of 1957 allows the nurse to perform function in case of emergency in case the doctor is not available at that moment.

5. Leaving Foreign Material

When the surgical operation is over and the surgeon is about to stitch the wound, there are cases where foreign materials like cotton gauges, mops and even surgical instruments are left behind in the body and stitches were done. Once a foreign body or material is left behind, it causes pus and the human body gets inflected resulting in serious damage to the

20. *Tapas Das v. D. K. Mukharjee,* 2000 (2) CPJ 73 (WB SCDRC).
21. *Dilbaugh Hussain v. Harjinder Kaur*, 2003 (2) CPR 467 (Punj SCDRC)
22. *P. M. Ashwin v. Manipal Hosp*., 1997 (1) CPJ. 238 (Kar SCDRC), See also *Moon L. C. Centre v. Margolis*, 535 NE 2d 956 (III Appct. 1989).
23. *Surinder Kaur v. State of Karnataka* (2014) 15 SCC 109. See also *Havrum v. U.S.* 204 F 3d 815 (1983), where water was hot with 40 degree allowed to take bath the hosp. license was cancelled.
24. *Surinder Kaur v. State of Har*., (2014) 15 SCC 109.
25. *R. C. Dwivedi v. M. E. C. Nursing* 2005 (2) CPJ 353 (Del SCDRC).
26. *Garima Gupta v. Singhal Hosp.* 2005 (1) CPR 507 (Raj SCDRC)
27. *P. Sudhakarv. Gauri Hosp.,* 2004 (1) CPJ 329 (AP SCDRC).
28. *K. G. Krishna v. Praveen Kumar*, 2003 (3) CLD 705
29. *Norton v. A. Ins Co.,* 144 S0 2d 249 (La ct. App. 1962)
30. *Berdyek v. Shande*, 613 NE 2d 1014 (Ohio 1993)
31. *Fein v. P. M. Group*, 38 Cal. 3d 137.

other parts of human body and finally even death of the patient. In this process of negligence, mainly the operating surgeon has to see before closing the operated part that no foreign material is left inside the body. Before surgical operation, generally the nurse deputed in the operation theatre, takes care that the surgical instructions are well sterilized, required medicines, glucose bottle, gauge, travels and sterilized hand gloves are kept ready. She is generally required to count these things before the surgical operated part is stitched so that nothing is left behind or inside the body. The litigation in this regard shows that foreign body is left inside the operated part. This raises the question: What was left behind in the body? How harmful was it? What were the surgical operations? Where did this mishap happen? And finally, who is accountable for such negligence?

The case law reveals that the foreign bodies left inside the body after surgical operations include mops, sponge, cotton gauze or even towel [32]and even surgical instrument [33]used during surgical operation. From the case law collected by the author, the major area was the obstetrics and gynecology. The person identified as guilty for the negligence were: the hospital or the hospital was held vicariously liable [35], and then the operating surgeon[36] was held guilty alone, and finally came the government hospital [37].

From the above case law, one thing that clearly emerges is that no concept of uniform liability has yet to emerge in this area of medical negligence. So far as the liability of the government is concerned, mere fact that the government is providing finances to the medical institution and the hospital run under the government control, it is submitted, when the government is not directly involved, it should not be saddled with such a remote or indirect liability. If such an approach is allowed then the State having widest capacity to pay for compensation as compared to other guilty persons or institution, the claimants would prefer to knock this avenue rather than making the nurse, surgeon or hospital liable. Moreover, the State through many agencies and institutions performs multifarious functions in that case any negligence by any person employed in such institution, will attract the State's liability.

The main question is, who is the real culprit involved in leaving a foreign body inside the operated part? The surgeon performs the surgical operation with the assistance of the operation theatre staff. After the surgical procedure finally he closes the parts that he had opened for operation. It is his mandatory duty before putting the stitches to make sure that no foreign material is left out inside the body. It is because of this the American Courts have taken a stand that in such cases the operating surgeon is solely responsible [38]. It may be pointed out that the surgeons are always in tension knowingly or unknowingly at the time of performing surgical operation and also the fear of litigation. In such circumstances, should the attending nurse in the OT be not considered under the responsibility to count before and after the surgical operation, the foreign material or instrument used in the procedure? The claimants generally in view of economic feasibility do not make a nurse a party to the litigation. But this cannot be held as a valid ground for a nurse to go scot free in the matter.

It may be pointed out that in such negligence, the role of an assisting nurse in the OT cannot be denied. It is here that the dispute settlement machinery has held a nurse liable for leaving foreign material inside the body [39]. It is submitted that such an approach is not correct. In the operation theatre, at the time of surgical procedure, there is a team involved in the operation. Moreover, she is assisting the surgeon who will finally stitch the operated part. It is his primary duty to see that nothing is left inside the body after operation and before stitches are provided. However, the entire procedure and nurse cannot work as robot. She, while making operation table ready, takes care that all the necessary items needed in the surgical procedure are kept ready and given to the surgeon in order of preference during and after the operation. In such circumstances, it is justified that both the nurse and surgeon may be held jointly liable[40] . In this regard, the *Romero case*[41] provides an important parameter. For such negligence, the Losangel Court of Appeal distributed the respon-

32. See, for example, *Meena Vyas v. City Nur. Home,* 2002 CCJ 1537 (Punj. SCDRC); *AparnaDutt v. Apollo Hospital,* 2002 ACJ 954 (Mad-HC); *Harvinder Kaur v. Dr. Shushma Chawla,* 2001 (3) CPJ 143 (Punj. SCDRC); *Achutrao v. State of Maharastra,* AIR 1965 SC 1039 (A towel was left).
33. *Dr. Madhavi v. Dr. Rajendra,* 1996 (3) CPJ 75 (NCDRC).
34. *Harvinder Kaur v. Dr. Sushma Chawla,* 2001 (3) CPJ. 143 (Punj. SCDRC).
35. *Aleyammc v. Dr. Dewarn Bahadur,* 1997 (3) SPJ 145 (Kar SCDRC).
36. *Beti Bai v. Dr. S. L. Mukherjee*, 2001 (3) CPJ 251 (MP SCDRC).
37. *Achutrao v. State of Maharastra*, AIR 1965 SC. 1039; Shanta v. State of A.P., 1977 (3) CPJ, 481 (AP HCDB)
38. *Ravi v. William*, 536 So 2d 1374 (1988); *Mosey v. Mueller*, 2018 NW 2d 514 (1974)-a case of leaving surgical instrument in the operated part of body.
39. *Aleyamma v. Dewan Bahadur*, 1997 (3) CPJ. 165 (Kar. SCDRC); See also Holger v. Irish, 851 P. 2d 1122 (Ori 1993); Madhuri v. Dr. Rajendra, 1996 (3) CPJ 75 (NCDRC)
40. *Aparna Dutta v. Apollo Hospital*, 2002 ACJ 954 (Mad-H.C.)
41. *Romero v. Bellina*, 798 So 2d 279 (La ct. App. 2001)

sibility with the share of surgeon 70% and that of nurse 30%.

6. Frivolous Litigation

One interesting thing in this area is that a large number of frivolous and vexatious litigations were initiated for financial gain and defaming the surgeon and hospitals [42] . In such cases either the patient was false[43] or the claimant could not prove it. The consumer forum has shown concern against such development. Should the forum not suo motu impose exemplary damages for the vexatious litigation? It may be pointed out that it takes years of hard work for any nurse, surgeon or hospital to develop their reputation in the medicare market and because of such fake attempts at times the nurse, surgeon and hospital suffer greatly. Is an order to the return the cost of litigation to the opposite party be "a deterrent action"[44] to do true justice in such cases? Why should such person be not black listed through media to teach them a lesson and so that when next time they go to the hospital, the hospital may adopt a careful approach with such cheats or quack patients?

IV EPILOGUE

The Constitution of India though provided a reasonable network for the nurses to take advantages of the constitutional benefits and privileges but it has yet to reach to their door steps. Thus the Constitutional Triveni Sangam remains in slumber without providing the nurses any protection and inspiration. It is time that the Nursing Council, Nurses' Associations and more particularly, their service receivers must see that the nurses get a balanced rightful constitutional claims.

The Nursing law has become outdated and outmoded. It mainly operates to regulate the activities of the nursing institutes. It has hardly concentrated on the uplifitment of nurses's status and controls their ill medicare services. The battalion of members of the Council have yet to care for one of the important medicare provider, the nurses. Further, the present legislation, instead of creating the Council, an inspector raj, must provide an authoritative regime for dispersing a balanced nursing service. The best have to be recognized and the black sheep have to be wedded out. Their working conditions and monthly perks are in no way attractive in the Government hospitals, however, in the private, it is worst. Unfortunately the entire approach of the law is that it treats the nurses like an Bandhua Mazdoor with no privileges, benefits and a favourable working environment. If India has to come up at a reasonable level in the world health system, it is time that the nursing law cannot neglect the nurses and accordingly it needs reforms to suit the changing times.

The criminal law remains a dormant statute in punishing the black sheep in this pious profession. It is time that in case of crime against humanity, the criminal sanction has to be advised by the stake holders through the Fast Track Courts. On the other hand, the consumer forum, though handled a large number of litigations, has become simply a compensatory mechanism fulfilling the demand of victim patients. However, looking to the economic viability of nurses, the mechanism hardly operated in the area of nursing profession. It is submitted that this cannot be a ground in exempting them from their responsibilities in cases of grave miscarriage in dispensing medicare.

The Consumer Forum and the Courts, it must be appreciated, have rendered justice to the patients against wrong and offensive medicare services. The case of leaving foreign materials in the patients bodies have attracted large number of litigations, showing blatant wrong committed by the medi-services providers, including nurses. The hospital management has to provide a full proof procedure to avoid such accidents and impose an individual liability on all the offenders to deter them from repeating the same mistake. However, simple error or wrong, which was not comprehended, cannot be actionable; otherwise, the fear complex would deter many to join this profession.

It is sad that assaults on medicare providers are on increased in India. There also on increase fraudulent and fictitious litigation against the medi-service providers and hospitals to offset the expenses incurred and get justified or unjustified compensation. The government cannot remain simply a spectator. A strict national law is the need of the time to control such anti-public health activities. The rejection of a wrong prescription of doctors by a nurse and application of an independent mind by the nurses in emergency cases have been, it is submitted, rightly

42. *Syed Zahid Ali v. Dr. Jaya Prakash*, 2000 (1) CPJ 129 (MP SCDRC); *Biharilal v. Dr. Prakash,* 1999 (3) CPJ 535 (MP SCDRC); *Satwant Kaur v. Dr. Karwaljit Kaur*, 1992 2 CPR 458 (Chandi. SCDRC).
43. See for example, *Satwant Kaur v. Dr. Kanwaljit Kaur*, 1992 (2) CPR 458 (Chandi. SCDRC), where in case of tubectomy it was alleged that a cotton sponge was left in rectum.
44. *Syed Zahid Ali v. Dr. Jaya Prakash*, 2000 (1) CPJ. 129 (MP SCDRC)

allowed by the dispute settlement mechanism. However, this will be always subject to one rider that the nurses should not take on its own the doctor's profession.

So, finally what comes out? The Nursing Law jurisprudence has yet to develop to fulfil its objectives. The need is that the law makers, justice dispensesors, the patients and, more importantly the nurses have to be educated and trained with the emerging technology in this field so that the nurses services could reach to excellence without fear, favour or greed. It is also the responsibility of the law schools to include nursing law as an important component in the Medical Law Course.

So, finally what is the Guru Mantra for the nurses? कर्मः स धर्मः|

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PROTECTION OF PLANT VARIETIES AND FARMERS' RIGHTS IN INDIA: AN OVERVIEW

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ABSTRACT

The Protection of Plant Varieties by means of intellectual property rights has become a subject matter of growing importance in the post TRIPs agreement years. The rationale to provide protection to plant varieties is to provide incentives to the actors engaged in plant breeding as returns of their investment in developing that variety. The introduction of a Plant Variety Protection regime in India was in the response to the obligation imposed under Article 27.3(b) of the TRIPs Agreement for the introduction of some form of IP protection for plant varieties. The law for protection of new varieties of plant and protection of farmer's rights was enacted in 2001 with an objective to protect the breeders of new varieties and farmers alike. The law treats farmers at par with breeders. It was a very forward looking legislation of its time. The law proposed a new model of plant variety law in which the concerns of conservers and preservers of variety and diversity has been given adequate space. After enactment of this legislation India has become one of the first countries in the world to have passed a legislation granting rights to both breeders and farmers simultaneously under one Act. The present paper presents an overview of the legal framework for protection of plant varieties and farmers rights in India. The salient aspects of the Act of 2001 has been examined in the special context of our socio economic realities.

Key words: Plant Variety Protection, Farmer's Rights, Sui Generis Protection, NDUS Criteria, TRIPs Agreement.

INTRODUCTION

Until 2001, India did not allow protection for plant varieties and farmers' rights. In 2001, India enacted a legislation for protection of plant varieties and farmers' rights pursuant to the obligations under the TRIPs Agreement, the Protection of Plant Variety and Farmers' Rights Act was passed in 2001. The introduction of a Plant Variety Protection (PVP) regime in India was the obligation imposed by the WTO, specifically under Article 27.3(b) of the TRIPs Agreement for the introduction of some form of IP protection for plant varieties.[1] This Act took a long time since its first draft made in 1993. In this Act, India has put in place a law to grant Plant Breeders Rights (PBRs) on new varieties of seeds and recognizes the role of farming community in the form of Farmers Rights (FR). It is argue that it is the first piece of legislation in the world which recognizes the phenomenal contribution of the farm families in conserving biodiversity and developing the new plant varieties.[2] Since every state has liberty to arrive at its own provisions to deal with plant varieties, it provides space to develop upon measures that could take the form of rewards and subsidies to farmers to follow agricultural practices to enhance agricultural diversity; but be based on free exchange of seeds with no exclusive monopolies.[3] India sui generis system for protection of plant varieties was developed, integrating the rights of breeders, and farmers. This Act recognizes intellectual property protection for new plant varieties.[4] The need for a sui generis system for PVP in India is to enable the nation to protect and preserve its farmers' rights on the one hand and at the same time grant rights to plant breeders on the other hand.[5] After enactment of this legislation India has become one of the first countries in the world to have passed a legislation granting rights to both breeders and farmers simultaneously under one Act. It is the only legislation in this area that grants formal protection to farmers in a way that prevents their self-reliance from being jeopardized while at

1. Philippe Cullet and Radhika Koluru, "Plant Variety Protection and Farmers' Rights: Towards a Broader Understanding", 24 Delhi Law Review, 2002, at 3.
2. Shanti Chandrashekaran and Sujata Vasudev, "The Indian Plant Variety Protection Act Beneficiaries: The Indian Farmer or the Corporate Seed Company?", 7 Journal of Intellectual Property Rights, 2002, at 506.
3. Ashish Kothari and R.V. Anuradha, "*Biodiversity, Intellectual Property Rights, and the GATT Agreement: How to Address the Conflicts?*", 2(4) Biopolicy, 1997, available at: http//bioline.bdt.org.br/py
4. Mohan Dewan, "IPR Protection in Agriculture: An Overview", 16 Journal of Intellectual Property Rights, 2011, at 134
5. Shanti Chandrashekaran and Sujata Vasudev, supra n. 2.

the same time recognizing the efforts of the plant breeders in developing new plant varieties.[6] By giving protection to the farmers' variety, the Act recognizes the farmer as both a cultivator and a conserver of the agricultural plant variety. The Act provides an effective system for protection of plant varieties, protection of rights of farmers and plant breeders; accelerate investment for research and development in growth of the seed industry, thereby ensuring the availability of high -quality seeds and planting material of improved varieties to farmers and other growers such as horticulturists.[7]

II. PROTECTION OF PLANT VARIETIES IN INDIA

The existing Indian legal framework under the PPV&FR Act, 2001 allows farmers to save, sow, resow, exchange, share or sell farm produce, including seeds of the protected variety.[8] However, the farmer in India is not entitled to sell 'branded' seed of a protected variety. This is inhibitory, since as long as the farmer continues to be just a 'grain producer' and is not given the right to be called a 'commercial seed seller' of the developed plant, he would lose his rights as an innovator.[9] Thus, non-recognition of farmers' role as innovator leads huge economic loss to the traditional farming community. The Act seeks to protect farmers from exaggerated claims by seed companies regarding the performance of their registered varieties. The Act also ensures that the seeds of these new varieties are of good quality, or at least that farmers are adequately informed about the quality of seed they buy. It establishes a system for an effective means of protecting plant varieties and the rights of farmers and plant breeders. The Protection of Plant Varieties by means of intellectual property rights has become a subject matter of growing importance in the post TRIPs agreement years. The rationale to provide protection to plant varieties is to provide incentives to the actors engaged in plant breeding as returns of their investment in developing that variety. In this context it is important to understand what is meant by a 'variety'. The Act defines the term 'variety'[10] which is similar to the definition in the UPOV Convention, 1991. It says variety means a plant grouping except micro-organism within a single botanical taxon of the lowest known rank, which can be defined by the expression of the characteristics resulting from a given genotype of that plant grouping; distinguished from any other plant grouping by expression of at least one of the said characteristics; and considered as a unit with regard to its suitability for being propagated which remains unchanged after such propagation and includes propagating material of such variety, extant variety, transgenic variety, farmers variety and essentially derived variety.[11] European Patent Convention[12], attempts to define the term 'variety' as a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeders' right are fully met can be defined by the expression of the characteristics resulting from a given genotype or combination of genotypes; distinguished from any other plant grouping by the expression of at least one of the said characteristics; and Considered as a unit with regard to its suitability for being propagated unchanged. Thus, to be eligible for protection; varieties have to be distinct from existing varieties, sufficiently homogeneous; stable; and new in the sense that they must not have been commercialized. New plant varieties are result of the process of selection and crossing, including modern techniques such as cell fusion which do not occur under natural conditions. It means breeding is the only way to obtain new plant varieties. In *Yoder Brothers Inc v. California Florida Plant Corp*[13], variety is defined as group of individual plants which on the basis of observation by skilled floriculturists and according to reasonable commercial tolerances, display identical characteristics under similar environment. In the same case the California Florida Plant Corporation defined variety as sub-species or class of 'chrysanthemums' distinguishable from other sub-species or classes of chrysanthemums by distinct characteristics, such as colour, hue, shape and size of petal or blossom or any of them. The definition of the term variety in *Pan-American Plant Company v. Matsui*[14] is more descriptive as it describes it as a variety of chrysanthemums plant is a group of plants which exhibit similar essential characteristics and which are distinguishable from other groups of plants by the presence of significant differ-

6. Sumit Chakravarty, Gopal Shukla, Suman Malla and C.P. Suresh, "Farmers Rights in Conserving Plant Biodiversity with Special Reference to North-East India", 13 Journal of Intellectual Property Rights, 2008, at 531.
7. The Protection of Plant Variety and Farmers Rights Act, 2001, Preamble.
8. Id., Section 39.
9. Mohan Dewan, supra n. 4.
10. The Protection of Plant Varieties and Farmers' Rights Act, 2001 Section 2(za).
11. The UPOV Convention, 1991 Article 1(vi).
12. The European Patent Convention, 1973 Article 1(vi).
13. 537 F.2d 1347, 193USPQ 264 (5th Cir. 1976).
14. 433 F. Supp 693 (N.D. Cal 1977)

ences with respect to one or more such characteristic. In *Imazio Nursery v. Dania Greenhouse*[15] Federal Circuit Court held that a variety encompasses a single plant, the plant shown and described in the specification of the plant patent. Protection of New Plant Varieties The Act states that protection of plant breeders is essential for the development of agriculture in the country which will facilitate the growth of the seed industry and will ensure the availability of high-quality seeds and planting material to the farmers. The term breeder includes farmer or group of farmers.[16] It means if a farmer or group of farmers' breads, evolves or develops new varieties of plant they will be given protection over that variety after registration. Farmer means any person who cultivates crops by cultivating the land himself; or cultivates crops by directly supervising the cultivation or land through any other person; or conserves and preserves, severally or jointly, with any other person any wild species or traditional varieties or adds value to such wild species or traditional varieties through selection and identification of their useful properties.[17] The Act makes clear that an application for registration can be made only in respect of three kinds of varieties which are variety whose genera or species is specified in the Official Gazette under section 29(2); an 'extant variety'[18] and a farmers' variety.[19] A variety shall be entitled to registration, provided the genera or species is specified or is an extant variety or a farmers' variety and that the application compiles with the formalities provided by the law and also that the applicant pays the required fees. While granting protection to the new plant variety, it is to be determined whether it is distinctive in its characteristic and is sufficiently homogenous and stable.[20] The Act has defined the term variety broadly by including the propagating material of such variety, extant variety, transgenic variety, farmers' variety and essentially derived variety.[21] The inclusion of extant variety and farmers' variety helps to protect varieties that do not fully meet the requirement of novelty. A new variety must be registered subject to satisfying the requirement of novelty, distinctiveness, uniformity and stability to get protection under the Act.[22]A new plant variety application which is not capable of identifying such variety or consists solely of figures or is liable to mislead or to cause confusion concerning the characteristics, value, identity of such variety, or the identity of breeder of such variety or is likely to deceive the public or cause confusion in the public regarding the identity of such variety; or comprises any matter likely to hurt the religious sentiments respectively of any class or section of the citizens of India; or is prohibited for use as a name or emblem for any of the purposes; or is comprised of solely or partly of geographical name in not registrable under the Act.[23] An application for registration shall be made by any farmers or group of farmers or community of farmers claiming to be the breeder of the variety; or by any authorized person.[24]After satisfying the requirements of registration farmers will be given legal protection over their variety. The protection grants exclusive rights to the breeders. The essence of granting legal protection to creators is to reward the creators of new and beneficial plant varieties to encourage commercial plant breeding; and to provide access to information of the created products. The idea behind the grant of exclusive rights to breeders is that in its absence, the dangers of free riding by third parties would be considerable since one of the most important characteristics of the new varieties that specify their distinctive and commercially valuable features, is their genetic material.[25]It is argued that in the absence of such rights, plant breeders are forced to work secretively and future workers will be denied access to the details of experiments and research.[26] It provides for plant breeder's right (PBR) to the breeders of plant varieties after registration.[27] But, every application shall contain a complete passport data of the parental lines from which the variety has been derived along with the geographical location in India from where the genetic material has been taken and all such information relating to contribution of farmers and communities in breeding, evolving or developing the variety; and a declaration that the genetic material/ parental material acquired for breeding, evolving or developing the variety has been lawfully acquired.[28]

15. 63 F. 3d 1560 (Fed. Cir. 1995)
16. The Protection of Plant Varieties and Farmers' Rights Act, 2001, Section 2(c).
17. Id., Section 2(k).
18. Id., Section 2(j).
19. Id., Section 14.
20. Elizabeth Verkey, Law of Plant Variety Protection (Lucknow: Eastern Book Company, 2007) at 122.
21. Ibid.
22. The Protection of Plant Varieties and Farmers' Rights Act, 2001, Section 15.
23. Id., Section 15(4).
24. Id., Section 16.
25. Mohan Dewan, supra n. 4.
26. Ibid.
27. The Protection of Plant Varieties and Farmers' Rights Act, 2001, Section 28.
28. Id., Sections 18(1)(e)&(h).

This Act also provides for researchers rights, benefit sharing between breeders and farming or tribal communities who have contributed to genetic diversity in detail.[29] Section 15 deals with the essential criteria to be satisfied for registration of all protectable subject matter. These requirements in the case of extant varieties (which also include farmers' varieties) are distinctiveness, uniformity and stability (DUS), while the new variety additionally requires novelty. All applications, except those from farmers, are to be complete in respect of the requirements stipulated under section 18. These include a sworn affidavit affirming absence of terminator technology in the candidate variety and a declaration on the geographical origin of material used for breeding the candidate variety, when such parental material was accessed from Indian genetic diversity, and that this parental material was lawfully accessed. Farmers are exempted from paying application fee mandatory with each variety application. Section 21 stipulates for advertisement of applications to invite opposition, if any, on the registration of the candidate variety. Wherever such opposition is received, further processing is resumed only after appropriate resolution of the opposition. Grant of registration, according to Section 15, will be only on satisfactory verification of novelty, distinctiveness, uniformity and stability of the variety, as may be applicable. Thus, the Act has well defined criteria and transparent procedures for determining eligibility of a candidate variety, its registration and publication. The chapter also discusses our preparedness to register extant varieties within 5 years and also the institutional capacity for DUS testing. The grant of registration confers exclusive right to the breeder, his/her legal successor, agent or licencee to produce, sell, market, distribute, import or export the variety. According to Section 24(6), the duration of registration is 18 years for varieties of vine and tree species and 15 years for the varieties of rest of the species, which, however, shall be initially allowed for a period of nine and six years, respectively. As a mechanism to support the cause of farmers and related issue of food security in rural sector, the present thesis argues for longer duration of protection for farmers' varieties. Maintenance of registration is subject to the annual payment of fee as specified under Rule 39, default of which may forfeit the registration. No maintenance fee is payable on farmer's varieties. Under specified and valid reasons, the Authority may revoke and rectify any registration granted, either suo moto or on request, and a fair opportunity is given to the PBR holder to counter the revocation process.[30] The essential criteria for protection of a variety include Novelty, except for the cases of extant and farmers' varieties, Distinctiveness, Uniformity, Stability (DUS) and Unambiguous denomination. A variety shall be considered new[31] if it was not placed for sale for a period not exceeding 12 months on the date of application in India. A variety registered outside India shall also be considered novel in case the period for which it was placed for sale does not exceed 4 years in the case of annual crop varieties and 6 years for trees on the date of application in India. To qualify for being distinct,[32] a variety must be clearly distinguishable for at least one 'essential character' from the varieties of common knowledge in India and outside. Here essential character means a 'heritable trait', which is determined by one or more genes or other heritable determinants that contribute to the principal features, performance or value of the plant variety. A variety shall be considered uniform,[33] subject to the variation that may be expected and allowed due to the specific nature of the reproduction of the plant species such a vegetative, self and cross-pollinated. For the purpose of considering uniformity in this Act, 'hybrids' shall be treated like self-pollinated plants. A variety shall be considered stable[34] only when all essential characters remain unchanged after its repeated propagation or specified cycles of propagation.

III. FARMERS' RIGHTS PROTECTION IN INDIA

Section 39 of the Act deals with farmers' rights and provides that any farmer who has bred or developed a new variety of plant shall be entitled for registration and other protection in the like manner as a breeder of a variety. The farmers' variety shall be entitled for registration. Any farmer who is engaged in the conservation of genetic resources of landraces and wild relatives of economic plants and their improvement through selection and preservation shall be entitled to recognition and reward. He shall be deemed to be entitled to save, use, sow, re-sow, exchange, share or sell his farm produce including seed of a variety protected under this Act. The farmers' rights of the Act define the privilege of farmers and their right to pro-

29. Id., Sections 30 and 26.
30. Ibid.
31. The Protection of Plant Varieties and Farmers' Rights Act, 2001, Section 15(3)(a).
32. Id., Section 15(3)(b).
33. Id., Section 15(3)(d).
34. Id., Section 15(d).

tect varieties developed or conserved by them.[35] Following rights have been accorded to farmers under this Act36: a) Rights to Seed The PPV&FR Act, 2001 aims to give farmers the right to save, use, exchange or sell seed in the same manner as entitled before the enactment of Act. However, the right to sell seed is restricted in that the farmer cannot sell seed in a packaged form labeled with the registered name.[37] b) Right to Register Varieties Farmers like commercial breeders can apply for IPR over their varieties. The criterion for registration of varieties is also similar to breeders but novelty is not a requirement. The ability to gain IPRs type rights over "farmer's varieties" is a unique aspect of India's law.[38] The Act provides that a farmer who has bred a new variety is entitled for registration and protection as a breeder of a new variety.[39] The definition of breeder also clarifies this position by including within the fold of breeder, farmer or group of farmers.[40] Apart from the right of registration of a new variety, the farmer has the right to register a farmers' variety. This allows ownership rights to the farmers apart from privileges. Initially the plant Variety Registry started receiving application from notified genera of 12 food crops as eligible for registration of their varieties under the Act. This opened a new era of protection of intellectual property right on varietal products used in Indian agriculture.[41] c) Right to Reward and Recognition A farmer who is engaged in conservation of genetic resources of landrace and wild relatives of economic plants and their improvement through selection and preservation shall be entitled in the prescribed manner for recognition and reward from National Gene Fund (NGF). Provided that material so selected and preserved has been used as donors of genes in varieties registrable under the Act.[42] d) Right to Benefit Sharing Benefit sharing would be facilitated through NGF to the farmers/community who can prove that they have contributed to the selection and preservation of material used in the registered variety. The authority under section 26[43] of the PPV&FR Act, invites claims of benefit sharing and Section 41[44] of the Act recognizes the rights of communities because of their role in conserving traditional knowledge in area of farming plant varieties. It provides that any person, group of persons (irrespective of whether actively engaged in farming) or any governmental or non-governmental organization may file claim on behalf of any village or local community which is attributable to the contribution of that village or local community in the evolution of any variety for the purpose of staking a claim on behalf of such village or local community. It is important to note that the Indian law allows claims of benefit sharing only once the breeder's variety is registered. It may be argued that the settlement of benefit sharing aspect must be a precondition for registration of a variety. e) Right to Information and Compensation for Crop Failure The Act provides that the breeders must give information about expected performance of the registered variety. If the material fails to perform, the farmers may claim for compensation.[45] This provision attempts to ensure that seed companies do not make exaggerated claims about the performance to the farmers. It enables farmers to apply to the authority for compensation in case they suffer losses due to the failure of the variety to meet the targets claimed by the companies.[46] The provision, however, does not sound practical in the context of India. Indian farmer, particularly a large number of small farmers may not be able to provide the input required/ prescribed by the breeder (which will lead to the promised performance) and thus the farmer's claim for compensation may never be allowed. A more practical approach in this context is desired. It may be ensured at the time of registration that breeder must not make out of proportion claims and promises about the performance of the variety. Indian farmers are not sufficiently equipped to bring the matter to light. f) Right to Compensation for Undisclosed Use of Traditional Varieties When breeders have not disclosed the source of varieties belonging to a particular community, compensation can be granted. NGO, individual or government institution may file a claim for compensation on behalf of the local community in cases where the breeders has not disclosed traditional knowledge or resources of the community.[47] g) Right to Adequate Availability of Registered

35. Pratibha Brahmi, Sanjeev Saxena, and B.S. Dhillon, "The Protection of Plant Varieties and Farmers' Rights Act of India", 86(3) Current Science, 2004, at 394.
36. Saksham Chaturvedi and Chanchal Agrawal, "Analysis of Farmer Rights: In the Light of Protection of Plant Varieties and Farmers' Rights Act of India", 33(11) European Intellectual Property Review, 2011, at 712.
37. The Protection of Plant Varieties and Farmers' Rights Act, 2001, Section 39(1)(iv).
38. Saksham Chaturvedi and Chanchal Agrawal, supra n. 36.
39. The Protection of Plant Varieties and Farmers' Rights Act, 2001, Section 39(1).
40. Id., Section 2(c).
41. Sudhir Kochhar, "How Effective is Sui Generis Plant Variety Protection in India: Some Initial Feedback", 15 Journal of Intellectual Property Rights, 2010, at 273.
42. The Protection of Plant Varieties and Farmers' Rights Act, 2001, Section 39(1)(iii).
43. Id., Section 26.
44. Id., Section 41.
45. Id., Section 39(2).
46. Saksham Chaturvedi and Chanchal Agrawal, supra n. 36.
47. The Protection of Plant Varieties and Farmers' Rights Act, 2001, Section 40.

Material The breeders are required to provide adequate supply of seeds or material of the variety to the public at a reasonable price. If after three years of registration of the variety, the breeder fails to do so, any person can apply to the authority for a 'compulsory licence'.[48] It is not out of context to mention that the corresponding provision in the Patent Act uses the words "reasonably affordable price" rather than "reasonable price" as used in the plant variety legislation. It is the affordability of the price which makes it a useful public interest provision. h) Right to Free Services The PPV&FR Act exempts farmers from paying fees for registration of a variety, for conducting tests on varieties, for renewal of registration, for opposition and for fees on all legal proceedings under the PPV&FR Act.[49] i) Protection from Legal Infringement in Case of Lack of Awareness Taking into account the low literacy levels in the country, the Act provides safeguards against innocent infringement by farmers. Farmers who unknowingly violate the rights of breeder shall not be punished if they can prove that they were not aware of the existence of breeders' rights.[50] The above list of farmer's rights indicates that the initiative taken by India has definitely yielded results but the true impact of the law will unfold in years to come. In order to ascertain its effectiveness, it would be important that there is an effective implementation of the mechanism for the realization of rights and obligations provided for in the system. The trend of registration partly proves it and the rest will unfold in years to come.

IV. CONCLUSION

The foregoing takes us to the conclusion that the Indian law treats the farmers at par with the breeder and this is a very significant contribution of Indian law on the subject. It is relevant to conclude that the enormous contribution of the farming community could not have been ignored on the assumption that plant breeding takes place only in the sophisticated labs and not on the fields. It is also important to note that some of the rights provided to farmers under the Act seem to be difficult to implement e.g. right to compensation for Crop failure for the reason that the commercial breeders usually subject the claim of expected production to certain conditions which are generally difficult for farmers to observe. Despite above it is a legislation in right direction provided it proves to be an effective mechanism which is to be seen and examined on the basis of the data available with the PPVFR authority. The examination of the effectiveness is beyond the scope of the present paper.

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48. Id., Section 47(1).
49. Id Section 44.
50. Id. Section 42.

ENHANCING JUDICIAL SKILL FOR EXPEDITIOUS DISPOSAL AND TRIAL OF CASES [1]

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ABSTRACT

Equal access to a civil justice system that can uphold citizens rights and fairly and effectively resolve disputes, is a fundamental component of a democratic society. It influences citizens lives every day via ownership & distribution of property, family matters, contracts, employment, personal safety, human rights and the benefits made available by the State to the citizens both as money value and as opportunity.

To begin with I quote Honore Balzac, the great French writer (1799-1850) who said that-

"To distrust the judiciary marks the beginning of the end of society".

Key words: Special Act Cases, Protection of Witnesses and Victimology, Civil Justice System, Citizens Rights, Ownership & Distribution of Property, Family Matters, Contracts, Employment, Personal Safety, Human Rights and The Benefits.

INTRODUCTION

Prologue

Rule of Law is the cornerstone of our Constitution. The court system is one of the supporting structures for establishing the rule of law. For this to be achieved, the legal system has to command the trust and confidence of the public at large. Such confidence is generated only from the performance of the courts. What the courts are meant for and what they deliver would come up for assessment when the effectiveness of the system is measured. Such an exercise would furnish the measure of legitimacy of the institution of courts in the perception of the public.

In the collection of Justice H R Khanna's talks in the book, "*Law, Men of Law and Education*" [3] *the learned judge of the Supreme Court of India says, "If an evaluation were done of the importance of the role of different functionaries who play their part in the administration of justice, the top position would necessarily have to be assigned to the trial court judge and trial court lawyer.*"

On the similar lines Nani Palkhivala, who was an ardent defender of the Constitution, a champion of civil liberties, as quoted by SRI M.V. KAMATH in the Biography of Nani A. Palkhivala , A Life, has said about the Constitution.

The Constitution represents charters of power granted by liberty, and not charters of liberty granted by power. Liberty is not the gift of the state to the people; it is the people enjoying liberty as the citizens of a free republic who have granted powers to the legislature and executive.

Today, the Judiciary is among the few institutions – perhaps one of just two or three that still commands respect, it is one of the few which the people at large still expect something from. And it has many, many sterling achievments to its credit.

COURTS AS AN INSTITUTION

Courts are the fora which a person in need of justice approaches. They are the instruments by which community standards are upheld. They have to fulfill community expectations that justice will be available to all on equal terms, whether rich or poor , citizen or foreigner, with a view to disputes being decided according to pre- existing rules those bind everyone. One of the goals of the justice system is to ensure that the period between the intiation and finalisation of court proceedings is as short as possible without compromising the quality of justice provided. The Supreme Court has emphasized in *Brij Mohal lal v. U.O.I* [4] *Husssainara Khatoon v. State of Bihar* [5] that

- the right to speedy justice is a fundamental right.
- It is, therefore, the constitutional duty of courts

1. Paper presented at Seminar held in Odisha Judicial Academy, Cuttack on 29th & 30th September, 2018 .
2. Director, Bihar Judicial Academy, Patna.
3. Khanna,Justice H.R., Law, Men of Law and Education(1981)
4. (2012) 6SCC 502
5. (1980) 1SCC 98

to provide that kind of justice.

- By the same reasoning, as a constitutional duty, governments are duty bound to provide the judiciary with the wherewithal to provide justice to citizens.
- The plea of financial limitations cannot be advanced as an excuse by governments for not doing their constitutional duty.
- Role of the Judge.

English Barrister David Pannick Has Written In His Book Titled 'JUDGES'

"Judges do not have an easy job. They repeatedly do what the rest of us seek to avoid: makes decisions. They carry out this function in public ... Rabelais' Judge Bridle -goose decided cases by throwing dice. Most judges obey the job requirements that they must not spin a coin or consult an astrologer but must give reasons for their decision..[6]

The role of the judge at the level of the subordinate judiciary is different from that in the High Court or the Supreme Court. At the subordinate level, the judge is concerned with facts' being the court of facts. It takes the law as it finds it in the reported decisions or It is guided by the statutory provisions. The mouldings of the legal principles, the innovative interpretations of legal principles or the fresh examination of legal thoeries are not his cup of tea. The higher courts do it. But then, the higher courts cannot build up the legal edifice without the foundation of facts. These facts are found by the trial court when it records the evidence, scrutinises it to appreciate it and concludes with the facts in the case. The fact finding role of the subordinate court is crucial .[7]

The Presiding Officer (P.O.) of the Court have to bear the following things in mind to impart justice in true sense:

Time Management- A Presiding Officer has generally about 250 working days (that is about 1250 court hours) in a year. He should know how much time he requires for preliminary work, how much time he can allocate for recording the evidence, how much time for hearing interlocutory applications and how much time for final arguments. He must conceptualise the entire day, week and month as different units, to manage your time. This will help him to plan the number of cases he can hear and decide in a month and then gradually increase his output. He should also provide time slots for his physical and mental well being (exercise/yoga/meditation) and time for his family.

Docket Management- On an average, each of the P.Os may have anything between 1000 to 3000 cases pending in his docket. He should know how to manage his docket. If he posts a large number of cases every day, then most of the judicial time will be spent in non-productive preliminary hearing. He should plan his working day – how many evidence cases he should list, how many argument cases he should list (taking note of the fact that some cases would get adjourned), how many cases he should hear and dispose of without delay. The lesser the number of hearings in a case, speedier will be the disposal of the case and lesser the hassles and harassment for the litigant. P.Os should not list too many cases for evidence and arguments.

Bar Management- Judge & the Bar, both are essential limbs of legal system, their relationship has to be based on mutual trust and regard. Lawyers are officers of the court. Unless Presiding Officers have their cooperation, they cannot dispose of cases, expeditiously or effectively. They should be firm in handling them, and at the same time courteous and diplomatic. They should show uniform courtesy to the members of the bar and litigants.

Self-Management-This means self-discipline, commitment and hard work. This refers to maintaining, good health and being punctual. if the Judges are late to court, they cannot expect the lawyers and staff to be prompt. They should hold court on time. They should be on the seat during the entire court working hours. They should deliver and furnish copies of the judgments and orders in time.

Effect of Court Delays

Delayed justice is Justice denied. There is a relationship between justice and the time consumed in rendering justice. If we do not administer justice at the appropriate moment, what we administer then is no longer full justice, it might even be injustice. Hence, it is essential, rather inevitable, that justice should be rendered without any delay. Prompt justice is true justice .[8]

The operation of an efficient and effective court system is crucial to the administration of justice and delays are a significant obstacle to achieve these goals. The classic definition of court delay is the amount

6. Panick, David. 'Judges'; Oxford University Press (1988)
7. Adjudication in Trial Courts,A Benchbook for Judicial Officers, N R Madhava Menon,David Annoussamy, D K Sampath, Lexis Nexis(2012)
8. Mohan,Arun. 'Justice,Courts & Delays' ,Universal Law Publishing(2009)

of time between the commencement and conclusion of court proceedings which exceeds the time necessarily spent in the preparation of a case for trial, the conduct of its hearing and the determination of its final outcome. Delays can occur at any stage of proceedings and more than one instance of delay can accumulate to create an overall delay in the processing of a case.

An important cause of delay is the mismatch between the caseload of the court and the resources that are made available to it. Causes also include problems with the management of the court resources and of achieving efficiencies or productivity . If arrears go on accumulating and piling up, it would create mass disenchtment and result in collapse of the judicial system, discontent in society and disrespect for law. The situation warrants that concrete and effective steps be taken to remedy this problem.

Root Causes of Delay:

1. Inadequate number of special courts and special judges.
2. Lack of assistance by Investigating Officer to the prosecutor.
3. Less number of Prosecutors.
4. Delay in execution of warrants by police officers.
5. Unnecessary adjournments taken by the prosecution and the defence.
6. Lack of proper witness measures and the court failing to act promptly in cases of complaints of harassment/inducement of witnesses.
7. Ineffective case management measures.
8. Trials are often held up on account of pendency of quash proceedings in the High Courts after the charges are framed.

Strategies for Speedy Disposal:

Judicial officers are not only need to be punctual but they should also be vigilant, careful and their actions must be swift, reasoned and they should also be aware of the latest technologies useful for speedy disposal of the cases such as:

1. Quality Investigation required

In ***King Emperor v. Khwaja Nazir Ahmad***[9] The Privy Council said,"the functions of the judiciary and the police are complementary and not overlapping". It is true that the working of both institutions police and judiciary is harmonizing in nature because it is the report of investigation, which is the base for the intiating a trial. Therefore, primarily the investigation team, which puts forth a prima facie case and thereafter the court adjudicates on the case. As a consequence, quality investigation would unquestionably aid in the speedy disposal of cases.

Complete Separation of Investigation from Law & Order:-

- Starting with investigation of heinous crimes, offences against women & children, and
- economic offences the complete separation should be executed within two years.
- The investigating wing should be made identifiable by providing unique uniform, brooch, etc.
- The officials posted in investigation wing must be trained in high skills of investigation more particularly in scientific investigations like voice call sampling, collection of CCTV footage, DNA profiling, reconstruction of crime scene, chemical analysis, sketching the picture of suspects, photographing the place of occurrence, finger print analysis, drawing the exact map of place of occurrence, collection of samples and their preservation, related to cyber offences etc.

First Information Report (F.I.R.)

- The online filing of F.I.R. (First information Report) and the follow up messages be provided to the informant and victim and following other guidelines of ***Supreme Court in Youth Bar Association of India v. Union of India*** [10]

Further, the copy of the FIR, except in cases relating to the offence of 'sensitive' nature, like sexual offences, offences pertaining to insurgency, terrorism, etc., is to be uploaded on the police website or the official website of the State Government within 24 hours of the registration and within 48 hours in case of connectivity problems due to geographical location or there is some other unavoidable difficulty. The time can be extended up to a maximum of 72 hours due to connectivity problems due to geographical location.

- The investigating team must reach at the place of occurrence at the earliest and cordon the area so that the place of occurrence may not be disturbed or evidences may not be tampered with. People should also be educated for not to disturb the place of occurrence.
- Investigation to be done only by the authorised person/authority in accordance with the nature of offence and requirement of law.

9. (1944 LR71)
10. [Writ Petition (CRL.) NO.68 OF 2016]

- There must be time bound completion of investigation, so far as possible, in every case. Within 90-days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years and 60-days, where the investigation relates to any other offence. The I.O. must inform the concerned cognizance taking court with explanation of sufficient reasons for delay, if any, in completing the investigation within stipulated period of time.
- As far as possible, seized items must be sealed at the time of preparing seizure list itself.
- Seized items must be deposited in the centralised malkhana at district level under direct control of concerned Superintendent of Police.
- Dealing with Forensic Science and Medical Reports for speedy Disposal:-
- A network of forensic science laboratories with ultra modern equipment and technology be established all over the states in the Country.
- There must be a guideline for time bound submission of FSL report before the court.
- Autopsy/Injury report of the deceased/victim must be prepared by the medical officer in triplicate (three copies) soon after examination of the victim or post-mortem of the dead body, without waiting for the requisition from Investigating Officer. One copy of the injury report be given to the victim, second to the I.O. and third be kept reserved with the concerned medical officer.
- The charge-sheet must contain mobile number, alternate mobile number, e-mail id, permanent address and present place of posting of the official witnesses (I.O., Doctor, Sergeant major, etc.). A common data base of all such official witnesses be created at district level in the office of Superintendent of Police, which is to be updated as soon as such officer is transferred.

Training of police personnels at district level and **separation of Investigation agency from Law and order** wing**. Quick response vehicle** like UP-100 be deployed at strategic places within state.

- **Fardbeyan be recorded in presence of S.H.O.** not by Munshi at police station. It results into flaws in respect of place of occurrence etc. Every P.S. should have a prosecution cell.
- Police must develop temperament for **scientific investigation** i.e. forensic science, DNA test, finger print etc. 25 best officers in each district be given further training for investigation purpose. How to utilize manpower is important.
- In cases of rape not only victim has to be **medically examined** but accused should also be medically examined.
- Software for preparing Injury Report and Post-Mortem Report be developed.
- New subjects like **NDPS Act, 1985**, **Cyber Law** have come up. Procedures mentioned under those laws must be strictly complied. Generally procedure prescribed under Sec 50 of NDPS Act, 1985 is not complied with. Guidelines issued by the Hon'ble *Supreme Court in U.O.I. v Mohanlal*, [11] must be complied by the Courts
- In maximum **Excise Act Cases** prosecution report is not attached.
- APO should be assigned to every police station. **Legal opinion of A.P.O. be taken before submission of charge-sheet** and special officers should be appointed for production and safety of witnesses. Number of APO should be increased.
- When witnesses not coming forward, then assistance to witnesses be given.
- **Forensic science laboratory** be made available at every range and district. Crime branch including FSL be strengthen. Case diary be prepared into two parts-1st part should contain oral statement and 2nd part must contain the statements under Sec 164 of Cr.P.C. Only relevant part of the Case Diary be given to accused.
- The accused has to be informed about his **right to be searched**. Provision of seizure of articles not being followed.
- In one FIR there should be **only one charge-sheet** and in absence of any new evidence, no further charge-sheet be submitted.

Responsibility of Public Prosecutor

The prosecutor should prepare his ground work before the commencement of trial. Statements should be thoroughly gone into and a rough outline should be arrived at so as to help in summoning the crucial witnesses at the apt time.

In a landmark pronouncement in *Siddharth Vashisht @ Manu Sharma v. State* [12] , It was held that though the primary duty of a Public Prosecutor is to ensure that an accused is punished, his duties extends to ensuring fairness in the Proceedings and also to ensure that all relevant facts and circumstances are brought to the notice of the Court for a just determination of the truth so that due justice prevails. In

11. Criminal Appeal No.652/2012 Decided on 28/1/2016
12. (2010) 6 SCC1

addition, there should be adequate number of Public Prosecutors to handle the huge numbers of cases.

- The charge-sheet and case diary in every case must be submitted to the concerned court after scrutiny and endorsement by the District Prosecution Officer (D.P.O.). Panel of experts must be constituted which may consist of retired judicial officers in every district to aid and advice the D.P.O. in scrutinising the charge-sheets/case diary.
- Prosecutors (P.P., A.P.P., D.P.O., and A.P.O.) must seek and collect summons and bailable warrants (BW) from the court concerned for production of witnesses in each case. For issuing non-bailable warrants (NBW), the concerned court should be approached along with the execution reports of previous processes.
- Prosecutors may be authorised to take assistance of Para Legal volunteers (PLVs) for facilitating the appearance of witnesses in court.Production & Examination of witnesses:-
- There must be created a Prosecution Cell in every Police Station under supervision of Officer-in-Charge of that P.S. It would be the duty of this cell to visit every court, collect summons & warrants issued for production/appearance of accused/witnesses and thereafter execute the same and produce accused/witnesses on fixed date in concerned court. The cell must be manned by adequate number of staffs of atleast literate Head Constable Rank. State Government should make arrangement for necessary infrastructure including vehicles and transportation/cost for the staff and witnesses/accused.
- In Sessions triable cases all witnesses must be produced before the court maximum within one years, failing which the I.O. would be required to explain reasons.
- Providing Video Conferencing facility upto Sub-Division level (preferably at Sub-Divisional Courts) for production and examination of witnesses through video conferencing.
- Generally the doctors are examined as the last witness and in the mean time he gets transferred to another place. In such a situation procuring the attendance of doctor becomes difficult and time taking. Cases in which doctor is a witness, his examination must be done as the first witness (PW-1).
- Examination of witnesses should be completed, preferably, on the same day and in exceptional cases it be carried out on day-to-day basis. Witnesses must be paid witness cost to compensate the presumptive earning of that day along with the traveling fare.

Quality of Witnesses Must Be Seen Not Quantity

One of the causes for delay is owing to the long list of witnesses to be examined . Thus even before the commencement of trial, necessary witnesses should be shortlisted. Mostly, witnesses speaking on the same points should be avoided to the exception of those circumstances that would require corroboration. This shall spare the time of the court to a large extent.

- Timely examination of official witness is important. Large number of cases are not being disposed off because official witnesses are not produced. District Magistrates should direct doctors within their jurisdiction to be present before court for evidence within time. **Data base of official witnesses and medical witnesses** for evidence be prepared and updated.
- If the official witness reaches the Court within Court hours, they **should not be returned unexamined** merely for late arrival in the court.Official witness's deposition gets delayed in court and because of delay their deposition is not recorded. This situation may be removed through adopting video-conferencing facility.
- All the Superintendents of Police be directed to ensure mentioning of **mobile numbers of all the private and official witnesses in the charge-sheet** so that attendance of the witnesses would be procured by the Court by contacting them on their mobile phones.
- Witness whose deposition could not be completed on the fixed date, the shortes tpossible date be given for his further evidence. **Witness should be provided accommodation to stay** if his deposition could not be completed on the same day. The state government should arrange their accommodation in Police Line for their safety.
- **Law Commission of India 198th Report** on "Witness Identity Protection and Witness Protection Programmes" may also Please Referred to for designing scheme for witness protection.
- A witness protection house in police line of each district be constructed for safe lodging of witnesses of cases where witness is to be examined on consecutive dates.

Need for ear-marked police personnel for Court Duties

The most conspicuous reason fot the delays in the progress of trial is non- execution of warrants by the

Police. Unnerved summons and non-bailable warrants have a telling effect on the Criminal Justice scenario. Hence, it is a prerequisite to have adequate number of police personnel for facilitating faster disposal of cases.

Training in latest technologies

Use of multimedia gadgets should be deployed so as to derive the utmost benefit from science and technology. The sophistication and complexity of these offences is a real challenge to the prosecutor. Therefore, the judges should be updated with modern techniques to handle complex issues. Information Technology Act, 2000 is a boon in this direction.

TRIAL

Speedy trial is embedded in Article 21 of Indian Constitution.In *Hussain and Anr. Vs Union of India*[13] the Hon'ble Supreme Court has laid down the time frame for conclusion of trial in lower courts and appeals in appealate courts.

SPEEDY TRIAL

- Every court should insist on submitting written arguments on behalf of both the sides before proceeding for hearing final argument so that unreasonable repetition may be avoided,but should not give undue adjournments for submitting the same.
- All the criminal courts should ensure strict compliance of Sec 309 Cr.P.C. Granting adjournments without sufficient reasons may be attributed to against the competency of concerned judicial officer and may be granted weightage in ACR.
- Criminal revision may be disposed of by Revisional Court at the earliest and, if possible, at the admission stage itself. For that purpose the Revisional Court may not even require production of Lower Court's Record (LCR), if it finds so. In cases where Lower Court Records are required, it must be sent to the Revisional Court expeditiously and after disposal of revision LCR must be sent to lower court without delay.
- Officers and Staffs of Civil courts be directed to mark their full signature on all official documents wherever signature is required.
- Use of electronic means (Video conferencing) for examination of witnesses in cases in which attendance of witness cannot be procured without delay or expenses.

INFRASTRUCTURE

All the civil courts at district and sub-divisional level must have well planned buildings with modern facilities and amenities. An integrated campus must be established having provisions for witness centres, library, record rooms, ADR centre, Mediation Centre, Court Hajat, Prosecution building, parking, restaurant, utility centres, etc.

The cleaning and service in Civil Courts must necessarily be outsourced to good professional Housekeeping agency.

- Separate Prosecution Building with all basic infrastructure, staff and resource (like stationery, vehicle, library, computers with internet facilities, etc.) be constructed in each district. There must be a permanent cadre of court management staffs attached with prosecution department. The bills submitted by PPs and APPs should be passed without delay.
- A common network should be established for P.S., Prosecutors and Courts for effective monitoring and follow up of progress in each case.
- Digitisation of all case records of all courts be done urgently. High technology equipment with permanent staffs skilled in operation of equipment be provided. Two staffs for each court for that purpose may be needed.
- To maintain judicial aloofness and security, all Judicial Officers must be provided government accommodation mandatorily. District Magistrate must ensure the availability of quarters to all the judicial officers till separate residential quarters are constructed for judicial officers in each judgeship.
- Safety of the court campus must be ensured to instil confidence and security in litigants. CCTV surveillance system must be installed in court premises and residential colonies.
- Judicial Officers are always at the risk of criminals. Their safety and security must be ensured to establish a fearless and independent judicial system.
- At the time of bringing any new enactment or an amendment to the existing Act, Judicial Impact Assessment (J.I.A.) must be done to speculate the burden it might put on the judicial system, like requirement of judicial officers, staffs, court rooms, accommodation in jails, police and prosecutors, etc. And accordingly an early arrangement must be made for proper implementation of new enactment.

MONITORING AND CONTROL

Strict Compliance of Rulings and Directions of

13. Criminal Appeal No.509 of 2017

Hon'ble Courts:-

Although there is a direction of Hon'ble ***Supreme Court in State of Gujarat v. Kishanbhai*** [14], but the same is not being followed in true sense.

The relevant portion of the aforesaid judgment can be quoted as follows:-

"'*On the completion of the investigation in a criminal case, the prosecuting agency should apply its independent mind, and require all shortcomings to be rectified, if necessary by requiring further investigation. It should also be ensured, that the evidence gathered during investigation is truly and faithfully utilized, by confirming that all relevant witnesses and materials for proving the charges are conscientiously presented during the trial of a case.*'"'*On the culmination of a criminal case in acquittal, the concerned investigating/prosecuting official(s) responsible for such acquittal must necessarily be identified. A finding needs to be recorded in each case, whether the lapse was innocent or blameworthy. Each erring officer must suffer the consequences of his lapse, by appropriate departmental action, whenever called for. Taking into consideration the seriousness of the matter, the concerned official may be withdrawn from investigative responsibilities, permanently or temporarily, depending purely on his culpability.*''*The Home Department of every State, to examine all orders of acquittal and to record reasons for the failure of each prosecution case. A standing committee of senior officers of the police and prosecution departments, should be vested with aforesaid responsibility.*"

- The role and responsibility of the Investigating Officer was further extended in trial stage also by Hon'ble Supreme Court of India in **Shailendra Kumar v. State of Bihar**[15] , by laying down that the role of investigating officer does not end with submission of charge-sheet, rather he must keep tracking the progress of trial too."The presence of investigating officer at the time of trial is must. It is his duty to keep the witnesses present."
- The I.O. of the case must be informed by the court as soon as trial of the case begins. Every P.S. must maintain a detailed case progress register mentioning the progress of trial (stage of trial, witnesses called for examination, witnesses examined, witnesses turning hostile, dates fixed for hearing, etc.)

MONITORING AND CONTROL

- Failure to execute the processes (summons and warrants) and produce accused/witness before the court on fixed date may be attributed to the responsibility of the Officer-in-Charge of concerned P.S., who also suggested to head the prosecution cell of his P.S.
- Every judgment may mention, in brevity, the reason for failure of conviction- attributed either to investigation or prosecution. The finding may be attached with the ACR (Annual Confidential Report) of the erring officer.
- There must be a SOP (Standard Operating Procedure) for continuous and effective monitoring of investigation and prosecution from district level to headquarters level:-
  - The Officer-in-Charge of every P.S. to submit monthly report to the Superintendent of Police of his district about the processes (summons and warrants) received from courts, processes executed and reasons for pendency of processes.
  - The Superintendent of Police to monitor the progress of execution of processes and present report in quarterly meeting of District Level Monitoring Committee (DLMC) chaired by District Judge. The Officer-in Charge of every P.S. would remain present to assist Superintendent of Police during the meeting.
  - The Superintendent of Police would also be required to submit monthly report to A.D.G. (Headquarter), which in turn would be monitored at D.G.P. level.
  - The District Magistrate (D.M.) shall monitor the progress of trials on monthly basis in a meeting with the Prosecutors. The progress report must mention the cases pending for examination of witnesses, number of witnesses examined, witnesses turning hostile, cases of conviction, cases of acquittal, reason for acquittal, etc. A quarterly report vis-à-vis progress of trial be discussed in meeting of District Level Monitoring Committee (DLMC) chaired by District Judge.
  - District Magistrates would also submit report to Director General, Prosecution, which in turn would be monitored at Principal Secretary, (Home) level.
  - Daily Progress Report (DPR) of each Judicial Officer would be one more step for the speedy disposal of cases.

EPILOGUE

After going through at length, the role various stakeholders in Justice Dispensation system, especially

14. (2014) 5 SCC 108
15. 2002(1)SCC 655

the role of the judges and causes for delay in the court, attention must be paid to ensure that the judicial administration is efficient and people are able to get results fairly, with confidence &trust, in a reasonable time and at a reasonable cost . This also includes punishing of the guilty within a reasonable time so that the people do not get a feeling that anyone can commit a crime and get away with it. It is time that an effort is made to achieve not only an efficient and effective functioning of the system but also one that ensures both welfare and a better quality of life for every citizen . A 'right' must not be denied and a 'wrong' must not remain either uncorrected or unpunished. It is thus essential to ensure speedy disposal of court cases.

Case Management, Court Management and litigation Management are the new areas of procedural jurisprudence and administration, and are of considerable importance. The long delays rather denial of justice that we currently see call for due attention. But case and litigation management are no panacea to solve the current ailment. They are only a methodology of achieving greater efficiencies from the judicial set up. But then, these methodologies and achievements are meaningless until several other aspects of our judicial system are given due attention.

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RIGHT TO FOOD AND HUMAN RIGHTS

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ABSTRACT

"By means of deep meditation and magical power it may be possible to sleep on fire, but it is impossible to sleep with an empty stomach in a situation of poverty."

Thiruvalluvar (50 BC)

The right to food is a human right. It protects the right of all human beings to live dignity, free from hunger, food in security and malnutrition. The right to food is not about charity, but about ensuring that all people have the capacity to feed themselves in dignity.

'Human Rights' means the right relating to life, liberty, equality and dignity of the individual guaranteed by the constitution or embodied the internal covenants and enforceable by Courts of India, as defined under the Human Rights Protection Act, 1993.

Justice Bhagwati in Menaka Gandhi's Case [1] has observed very precisely, "*all those rights which are essential for protection and maintenance of dignity of individual and create conditions in which every human being can develop his personality to the full extent may be termed as Human Rights*."

On the basis of the above mentioned definitions one can say that 'human rights" are those fundamental and inalienable rights which are essential for life as human being. It can also be said that human rights can be represented as claims which individual or groups make on the society. These rights include right to life, right to liberty, right to dignity etc. without those right human beings can not develop themselves.

Key words: Human Rights, Right Relating to Life, Liberty, Equality and Dignity, Combat Disease & Malnutrition.

INTRODUCTION

On the basis of the above mentioned definitions one can say that 'human rights" are those fundamental and inalienable rights which are essential for life as human being. It can also be said that human rights can be represented as claims which individual or groups make on the society. These rights include right to life, right to liberty, right to dignity etc. without those right human beings can not develop themselves.

The 'right to life' is our basic human right and the term `life' has very expansive meaning which is guaranteed under Article 21 of the Indian Constitution. Justice Bhagwati has observed in Francis Coralie case "we think that the right of life includes the right to live with human dignity and all that goes along with it namely the bare necessities of life such as, adequate nutrition, clothing and shelter over their head"[2]. The 'right to life' is given a wide interpretation by the Supreme Court so as to include 'right to food' so that democracy and full freedom can be achieved and slavery in any form is avoided.

The meaning of the term 'food' as stated in the Oxford Dictionary is 'Food' means a nutritious substance taken into by an animal or plant to maintain life and growth. When we speak about right to growth or development three rights come to our mind i.e. the right to food, health care and education, without which human beings can not be developed. The right to food which is complementary to the `mother' of human rights, which is the non-derogable right to food. The right to food is recognized in many international instruments of which Universal Declaration Human Rights 1948 is supreme. Article 25 of the UDHR runs that 'everyone has the right to a standard of living adequate for the health and well being of himself and his family including food, clothing, housing and medical care..'

1. *Maneka Gandhi vs. Union of India,* AIR 1978 SC 597.
2. *Francis Coralie vs. Delhi,* AIR 1981 SC 746, 753

The right to food enforce to pre-requisites. First is that the food must be available and second is that it must be accessible. The right to food has embedded in the State's constitution or guiding principle so that the State has to look towards the welfare of its subjects.

The 'right to food' was first of the Economic, Social and Cultural Rights which was started by the United Human Rights system. In 1986, "the right to food as a human right." Became the starting point for a series of investigations into the right contained in the International Covenant on Economic Social and Cultural Rights.

The International understanding of 'Food Security' is elaborated in the plan of action of the World Food Summit (1996), which states that 'Food Security' at the individual, household, national, regional and global level is achieved when all people at all times have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.

At the international level, there are several human rights. The right to food is a part of the founding human rights text of the post world war – II era. The Universal Declaration oif Human Rights, 1948 (UDHR); the international covenant on civil and political rights, 1966 (ICCPR) and the International Covenant on Economic, Social Deed Cultural Rights (ICESCR). Other international legal instruments that incorporate the right to food include human rights treaties on the rights of women, children, refugees, disabled persons and instruments relating to the conduct of states during armed conflict.[3] The Universal Declaration of Human Rights, 1948, also known as the Magna Carta of human Rights, states in Article 25 (1)" Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care & necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[4]

The 1960s saw the independence of many third world nations from long years of colonial rule under banner of non-aligned movement. Economic and social rights that were relegated so long in darkness came to the fore. "National Constitutions recognised economic and social rights along with civil & political rights. 1966 marked a land-mark in international human rights jurisprudence. Two landmark United Nations Covenants were adopted i.e. the International covenant on civil & political rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966. The latter Covenant observed in its Article that "The States Parties to the present covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions." The World Food Conference Declaration November 16, 1974 observed that "everyman, woman and child has the inalienable right to be free from hunger & malnutrition in order to develop fully of maintain their physical and mental facilities. Society today possesses sufficient resources, organization ability, & technology & hence the competence to achieve this objective. Accordingly, the eradication of hunger is a common objective of all the countries of the international community, especially of the developed countries and others in a position to help[5]. The declaration was later endorsed by the United Nations General Assembly in Resolution 3348 (XXIX) of Dec 17, 1974 Declaration 1974 Art. 24 of the Convention of the Rights of the child, 1989 regarded as the Magna Carta for Childrens, observes that "States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health." And shall take appropriate measures to "Combat disease & malnutrition". South Africa's post – apartheid Constitution 1994 is very progressive it asserts that "everyone has the right to have access to ... sufficient food and water". It specifies that the state has to provide for the right of every child to adequate nutrition[6].

The right to food is basic to the enjoyment of other rights and is key to achieving the human right to like with human dignity. "Hunger is by for the most fragrant and widespread of all serious human rights abuses".[7] For plays a special role in international humanitarian law, specially in conflict situations. In 2001 the international committee for the Red Cross Stated that international humanitarian law prohibits starvation of civilians as a method of combat, that

3. Surabhi Chopra, Holding the state Accountable for Hunger, Economic & Political Weekly August 15-21, 2009 No. 33, P8
4. Yearbook of the United Nations, 1966 Published in 1968.
5. Achieving the right to food – the human rights challenge of the twenty first century. Published by FAO. www.fao.org/otesandrighttofood/wid/pdf.2007
6. I bid.
7. Philip Alison & Kartarina Thomasevski quoted by George Kent. Food as a human right. http://www.cholke.org/document/Food_humanRt.

such starvation amounts to war crime, that attaching, destroying etc. of food crops is prohibited; that forced displacement is prohibited since it is a major cause of hunger; & to allow impartial relief operations including food to civilian population.[8] The Millenium Summit of the United Nations 2000, adopted eight-goals & the first goal was to have, by 2015, the proportion of the world's people who suffer from extreme poverty and hunger. This was a follow up to the World Food Summit of 1986.

Despite such international human rights instruments and initiatives of national governments, the situation continues to be grim. The most vulnerable sections include landlords farmers, urban slum dwellers, people leaving in conflict zones, those affected by HIV/AIDS and the extremely poor. India makes 66th out of 88 developing countries on the Global Hunger Index. It trails Sub-Saharan Countries like Cameroon & Sudan, where the per capita income is much lower than in India.[9] Clearly, India's compressive growth has not-translated into eradicating hunger, and the state needs to take concerted, urgent steps to secure the right to food for the citizens. The new government is considering legislation on food security and nutrition. It well drafted, such legislation has the potential to serve as a catalyst for action as a bargaining tool to pressure state machinery & as practical resource for those whose right-to food is violated.[10]

Ending World hunger and Nutrition is not simple. It involves struggling to win recognition of the right to a proper diet to a basic human right, for sufficient food and a balanced diet are essential human biological needs. To overcome the agrarian crisis, agriculture needs to be given its proper due, with land reforms and co-operatives bringing about near self-sufficiency as far as National Food Requirements are concerned. The right to food has to prevent over the right to profit.[11] In the 21st Century National and global economic systems have to honour obligations to those humiliated by want. The ultimate purpose of global economic growth is to provide people the dignity of being free from want, a point emphasised by the human development perspective.[12]

There are other International Conventions to which India is also a signatory which refer to the right to food. These includes the convention of Elimination of All Forms of Discrimination against Women (CEDAW) and the International Convention on the Right of the Child. Thus as a member of the International Community it is an obligation to provide adequate safeguards for protecting the valuable and basic right viz. the Right to Food. Though the right to food is not specifically mentioned in our constitution, it can be seen to be implicit under Article 21, 39 and 47.

Right to Food under Indian Constitution

There is no fundamental right to food but the fulcrum of justiciability of the right to food comes from a much broader right to life and liberty' as enshrined in Article 21[13].

A most remarkable features of this expansion of Article 21 of the Constitution is that many of the non-judicial directive principles embedded in Part IV of the Constitution have now been elevated as enforceable Fundamental Rights by the magic of judicial activism, played on the said provision of Article 21 for example, the right to pollution — free water and air, right to shelter, right to food, clothing etc.[14]

Similarly Article 23 gives protection against exploitation. It prohibits traffic in human beings and beggars and other similar forms for forced labour and makes any contravention to this an offence punishable in accordance with the law.

Apart from the Fundamental Rights enshrined in the Constitution, Part IV of the Constitution provides for Directive Principles of State Policy which are required to be issued by the State while evolving its policies. For that Article 38 requires the State to secure a social order for the promotion of the welfare of the people, in which Justice — Social, Economic and Political — shall inform all the Institutions of the national life. Another important provision, Article 39 provides that the States shall direct its policy towards securing that 'the citizens men and women are equally have the rights to an adequate means of livelihood.' Needless to say, food is not only a means

8. George Kent, ibid.
9. Surabhi Chopra, Holding the State accountable for Hunger, Economic & Political Weekly, August – 15, 2009, Vol XLIV No. – 33.P.8.
10. Ibid.
11. Right-to food.
12. Human Development Reports 2000. Human rights & human development, United Nations Development Programme Published by Oxford University Press, 2000, P.12.
13. Article 21 read as No person shall be deprived of his life of personal liberty according to the procedure established by Law.
14. Law relating to Protection of Human Rights under Indian Constitution and Allied Laws by Justice Polok Basu, First Edition, reprint 2006, Modern Law Publication, P 189.

of livelihood but is a necessary for survival.

Further Article 43 provides that the States shall endeavour to secure, by suitable legislation or economic organization or in any other way, to all workers (agricultural, industrial or other) work, living wage, conditions of work ensuring decent standard of life and full enjoyment of leisure and social and cultural opportunities.

Article 47 provides that States shall regard raising the level of nutrition and the standard of living its people and the improvement of public health and among its primary duties. The Indian Constitution has a federal structure and is in consonance with Fundamental Rights and the Directive Principles of the State Policy, Entry 33 of Scheduled seven of List III, inter alia, provides that with regard to supply and distribution of food stuffs including oils and oil seeds. legislation can be passed by the Union as well as by the State. Hence the Constitutional sources, 'right to food' as the protection of life, personal liberty, right to work, right to health, freedom from starvation, right to sustenance, provision of adequate nutrition, improvement of health, standard of living, right to live with human dignity, payment of minimum wages etc. as provided in the aforesaid Articles.
Judicial Approach :

'The right to food' has become an inviolable part of the basic structure of the Constitution, which is inconformity with the culture of India. Legal action is one of the means that can be used in a democratic political system, to hold the State accountable to its responsibilities. It is in that spirit that People's Union for Civil Liberties approached to the Supreme Court in April, 2001 to seek legal enforcement of the right to food which is popularly known as 'right to food case.[15]' However, even before this milestone, the Indian Judiciary have shown a lot of concern towards this valuable right through its pronouncements.

The Supreme Court in another case in State of Gujarat vs. Mirzapur Moti Qureshi Kassab Jamat and others[16]. Put blame on the distributive system and thereby the role of executives.

In *Chameli Singh vs. State of Uttar Pradesh*[17], it was held that right to life guaranteed in any civilized society implies the right to food, water, decent environment, education, medical care and shelter.

The Right to Food case is a massive litigation and its complexity grows every year. In view of the serious concern shown by the Apex Court, about fifty interim orders have been issued, is dealing with the passive need of the time. For instance, one interim order directs the Govt. to provide Mid-day Meal in Primary School.

Other problems are Inspite of the increase in food subsidy, the overall impact on the poor is still wanting there has been significant diversion of commodities under the Public Distributive System (PDS) to the open market. There are also problem in delivery, quality and coordination. However efforts are underway to rectify some of these problems. The problem encounter in implementing RTF into (i) Resource can constraints; (ii) Problems of governance and lack of political will; (iii) Lack of an overall framework for implementation and monitoring; (iv) Lack of appropriate indicators and bench marks for monitoring and (v) Difference in natures of challenges in rural and urban areas.

Although the main responsibility of realizing RTF lies with the Govt., it is submitted that the co-ordination of Govt. with the NGO's and other members of Civil Society are important. However NGO's also need to work on the principles of transparency and accountability. Moreover the Govt. should bring reform in PDS for effective realization of this right and open more fare price shops.

SUGGESTIONS

(i) All Human Rights are Universal, individual and interdependent and interlinked. To enjoy any Human Right may it be civil, political or economic, social and cultural in nature[18], the realization of all other Human Rights is equally necessary. Hence, to enjoy right to life[19], right to food and nutrition is equally important[20]. A right based approach to food is necessary rather than charity best approach.
(ii) National Govt. has a great responsibility to do everything possible to ensure that there people

15. *People's Union for Civil Liberties vs. Union of India* and Others, WP 196 of 2001.
16. A.I.R. (2005) 8SCC 534.
17. (1996) 2SCC 549.
18. These Rights are considered as two sets of Human Rights, Civil and political right called as First Generation Right and economic, social and cultural rights are called as Secondary Rights.
19. It is a civil and political right recognized by ICCPR Artcle.6.
20. It is an economic, social and cultural right recognized by ICESCR Article 11.

have right to food. Political will, is necessary for such things. Human Rights Legislation can provide a foundation for action against hunger.

(iii) Its should always be remembered that there is a difference between `commodity' and 'a necessity'. It should be considered by all policymakers that food is not nearly a commodity like colour TV. As suggested by former U. S. President Bill Clinton, in his speech, "We should go back to policy of maximum food self sufficiency. It is crazy for us to think we can develop countries around the world without increasing their ability to feed themselves.[21]"

(iv) The Govt. of developing and developed countries should first tried to identify the reasons and causes of food shortages.

(v) Research should be done to find out the major obstacles to effective realization of right to food for all.

(vi) The countries should cooperate with each other and transfer technology for augmenting food production, supply and equitable distribution of food.

(vii) Right to Food is a basic and fundamental Human Right. Hence we should be made a justiciable right. The State should enact appropriate and effective legislations for securing right to food to all individuals. There should be an appropriate mechanism for redressal of Right to Food.

(viii) Awareness should be created by the media regarding the need and importance of food security.

(ix) An appropriate and effective mechanism should be developed under International Law in order to make the National Governments accountable for violation of basic right to food for its individuals.

It is undoubtedly tremendous task to see that hungry mouth is fed and that too, with sub-standard food. However the tasks is a must if one wants to prosperous and healthy India.

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21. U. S. President , Bill Clinton, speeches at United Nation World Food Day, October, 16, 2008.

FREEDOM OF EXPRESSION AND MEDIA TRIAL

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ABSTRACT

Justice, unlike politics cannot fall victim to the appeasement of masses and in the light of this statement ,the article titled "Freedom of expression and media trial", deals with the freedom of expression exercised by media under article 19(1)(a)and simultaneously showcases the confrontation between the right to freedom of expression and Media trial,which is part and parcel article 19(1)(a). Media,which is the sentinel of our democracy has been assigned with the function of fulfilling the right of the public to be informed but in doing so it transgresses, to the extent of violating the right to privacy of the accused, witness, victims, right to fair trials of the accused and even commits contempt of court by interfering with the administration of justice. Despite several rules and regulations by Press Council of India and many guidelines issued by Supreme Court intermittently, media remains unbridled and unchecked within its domain. Therefore, the authors have tried to prove the aforesaid hypothesis with the help of many judgments and existing legislations, and also have co-related it with many real life instances. Finally, some reformative measures have been opined so as to draw the balance between the two rights harmoniously.

Key words: Freedom of Expression, Media Trial, Fulfilling The Right of The Public, Press Council of India, Guidelines, Balance Between The Two Rights.

INTRODUCTION

Media and Its Overarching Tendency

Media by acting and working, so diligently and scrupulously has made it seem that it is the only one who keeps public interest at the pedestal. The importance of media, unarguably, is undeniable and indispensable as it the one, which brings the issues from the grave to the fore, and forces public at large to build an opinion regarding the issues of social interest. It is the media which arouses the consciousness of the common people and tries to axe the rotten seeds of the democracy. In a healthy democracy, the apt example of which India is, people have substantive right to freedom of speech and expression and the source of forming the ideas, opinions and beliefs is the information, which is provided by the media. Therefore, freedom of speech and expression is somewhat, to an extent, depends on the information, that one seeks, which is continuously replenished by the media.

The efforts of media have always been praised and acclaimed as it plays an outstanding role, in turning the words of the politicians into actions, by persistently making the government regretful about its unjust orders and busting the scams and raising the voices of the marginalized sections. Several times, it is the media which investigates, by carrying out sting operations, and tries to show the extent of prevalent corruption. It is sometimes due to media, the government hastens in investigating about the infamous cases,like we have seen in the alleged corruption case of seven hundred billion in Commonwealth games scam and worth 1.86 trillion in the Coalgate scam in which the Comptroller and Auditor General, India's audit watchdog, reported inefficient and possibly illegal allocation of coal blocks between 2004 and 2009.

Media is the sword arm of democracy which ardently waits to behead any social devil and uncluttered the mess. It protects and promotes social equality, harmonious relations between different castes and tribes and strives to maintain a unified society which is free from any trouble.

Though, media has, by its relentless efforts, proven, it is the fourth pillar of the democracy, it has occupied an unimpressive position from which it has its arms hovered over everything which can be detrimental for a sound democracy. It has adopted a tendency to intrude into every issue and everyone's life, thinking it to be an entrenched right. Be it a private affair of notability or infraction of legal norms and procedures, it never inhibits itself from moving against either of them. Media certainly has become an overreaching power which tries to haul every segment of the society. Recently famous cricketers of India Hardik Pandya and KL Rahul uttered some sexist comments on a talk show and the way it was presented by the media, it seemed that it was a part of rarest of rare case ensuing which they had to face intense ig-

nominy and opprobrium by the public and aftermath of which, they were called off from the then-going series against Australia and were suspended by BCCI and it was reported that for several days they did not step out of their house.

The term 'Media Trial' refers to the trial by media of an event or criminal casein which it carries out investigative journalism, and by holding public debates, it creates a perception of guilt or innocence about the accused. It is compelled to cover sensational news rather than deep and holistic news. The efficacy of media's reporting is such that it can make people believe that a wedge is a sword. Former CJI Dipak Mishra,on March 15, 2018, while hearing an appeal filed by news website Wire against the Gujarat high court's January 8, 2018 order refusing to quash criminal defamation proceedings initiated against it by Jay Shah, son of Bharatiya Janata Party (BJP) president Amit Shah said, "Journalists cannot write anything they imagine and behave as if they are sitting in some pulpit. People think they are Pope sitting in a pulpit and can pass judgment or deliver sermon. The question of gagging the media does not come at all. I have myself rebuffed all attempts to gag the media, but we do expect media, especially electronic media, to become more responsible".[1] Therefore, media should have learnt a lesson form this admonishment by the apex court as being an important part of the democratic structure, it is obliged to maintain and follow propriety and should never take public's belief for granted.

Media, which is always anxious to perform the functions of judiciary, forgets to observe the principles of natural justice which is the foundation of a successful legal system. It blatantly disregards its basic principles, which are, no one shall be a judge in his own cause(nemo in propria cause judex and hear the other side(audi alteram partem).When allegations are cast upon media, it remains unflinching in its defense and the principle of audi alteram partem is seldom followed by it as accusation means culpability for media. As criminal law follows the principle of "innocent until proven guilty", media runs on a reverse direction and holds the "accused guilty until he is proven innocent" by the court.

It tries to overlap the ambit of judiciary by holding simultaneous trials but as courts are required to follow certain procedures of Civil Procedure Code and Criminal Procedure Code, media in its trial does not follow any procedure and shows the events in a way which befits its motive, that is to increase its TRP and accumulate monetary gains. It is compelled to cover sensational news rather than deep and holistic ones. Media, always makes an attempt to outclass other agencies of the state and tries to show that it is the savior of the rights of the public and it holds pre-eminence.

Freedom of expression

Freedom, that is in severable and inalienable part of human existence, till now, has undefined horizon and in the Indian Constitution the word freedom in Article 19 infers absence of control by the state. [2] Article 19(1) (a) of the Constitution of India guarantees to all its citizens the right to freedom of speech and expression. The law states that, "all citizens shall have the right to freedom of speech and expression". Under Article 19(2) "reasonable restrictions can be imposed on the exercise of this right for certain purposes. Any limitation on the exercise of the right under Article 19(1) (a) not falling within the four corners of Article 19(2) cannot be valid. Freedom of speech and expression enables a society to be healthy and productive in thoughts and opinions, making the people tolerant and accommodative of the views of others. The views expressed can be propagated via any form or mode like in words, writing, poems ,movies etc. and as India is the world's largest democracy it is imperative to protect the fundamental right to speech and expression. In ***RomeshThappar v State of Madras*** [3], the Supreme Court of India held that the freedom of speech and expression includes freedom to propagate ideas which is ensured by freedom of circulation of a publication, as publication is of little value without circulation. **Patanjali Sastri, J.,** rightly observed that-

'Freedom of Speech and of Press lay at the foundation of all democratic organizations, for without free political discussion, no public education, so essential for the proper functioning of the process of Government, is possible'.

Under the Freedom of Speech and Expression, there is no separate guarantee of freedom of the press and the same is included in the freedom of expression, which is conferred on all citizens **Sakal Papers Vs. Union of India**. [4] It has also been by this judgment

1. Supreme court stays defamation proceedings, the economic times, march 2018, available at *https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-stays-defamation-proceedings-by-jay-shah-against-news-portal/articleshow/63314770.cms*
2. *State of Karnataka v Associated Management of* (*Government Recognised-Unaided-English Medium*) *Primary and Secondary Schools*, AIR 2014 SC 2094
3. *RomeshThappar v the state of madras* AIR 1950 SC 124.
4. *Sakal Papers v UOI, AIR* 1962 SC 305

that freedom of the press under the Indian Constitution is not higher than the freedom of an ordinary citizen.

In the famous case *Express Newspapers (Bombay) (P) Ltd. v. Union of India* [5] court observed the importance of press very aptly. Court held in this case that "*In today's free world freedom of press is the heart of social and political intercourse. The press has now assumed the role of the public educator making formal and non-formal education possible in a large scale particularly in the developing world, where television and other kinds of modern communication are not still available for all sections of society. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate [Government] cannot make responsible judgments. Newspapers being purveyors of news and views having a bearing on public administration very often carry material which would not be palatable to Governments and other authorities.*"

But this right has been grossly misused by the media as Press Council of India Act 1978 was introduced to preserve the freedom of press and to maintain standards of news agencies in India but the powers given to it are so frivolous that it can't even take any action against indecorous reporting and the most it can do is, admonish. Several examples can be cited in this context. It is highlighted in the recent case where the allegations of misconduct were labeled against two former Supreme Court judges. One against Justice A.K.Ganguly where media had worked overtime to destroy his reputation and made him resign from all the posts which he was holding and disgraced him before anything could be proved against him. Another case was that of Justice Swantantra Kumar facing the similar allegation, but only so, in this case he continued to head Green Tribunal, while the matter was still under investigation. Therefore, it would be apt to say that eccentric media trial is not only illegal but immoral as well. [6]

Contempt of Court

While exercising freedom of expression guaranteed under article 19(1)(a) of the Indian constitution excessively, media goes to the extent of violating not only rights of alleged accused or other individuals involved but it also commits contempt of court by interfering with the administration of justice. What media trials basically do and how does it interfere with the administration of justice in plain words is that- it declares an alleged accused as an accused or an innocent before, or after, a verdict in a court of law, which is the duty of the court to come to that conclusion after perusal of all the presented evidence and in the case if court declares an alleged accused guilty, then that should be based on two main principles, first that he should be presumed to be innocent until proven guilty, and second that he should be proven guilty beyond reasonable doubt. This duty is somehow undertaken by media and in the name of investigative journalism it goes to the length of violating all those aforesaid principles and forms a prejudicial opinion regarding the guilt or innocence of the alleged accused according to the public sensitivity to that particular matter and becomes selectively permeable to publishing the available information, thus deviating from its path of fair and accurate reporting. Such actions of media should not go unpunished but it happens so, due to the lacunas created by our present legislation.

Section 2 of the Contempt of Courts Act, 1971 recognizes both civil and criminal contempt and defines latter as the publication of any matter or doing of any act which scandalizes or lowers the authority of any court; prejudices or interferes with the due course of any judicial proceeding; interferes or obstructs the administration of justice in any other manner. However, section 3(1) of the Contempt of Courts Act, 1971 puts a limitation over the section2 and states that a person shall not be guilty of contempt of court if he has published any matter which interferes or obstructs the course of justice in connection with any civil or criminal proceeding pending at the time, when he had no reasonable grounds for believing that the proceeding was pending. The judicial proceeding is considered to be pending in the case of a civil proceeding when a plaint is filed and in the case of a criminal proceeding related to the commission of an offence when the charge sheet is filed or when the court issues summons or warrant against the accused, and in any other case when the court takes cognizance of the matter and these proceedings shall be deemed to continue to be pending until it is heard and finally decided after the appeals made to the concerned courts or otherwise until the expiration of the limitation period for appeals. Sowe can see how section 3 provides an escape door for the possible perpetrators of the contempt of court.

In this very context, *Supreme Court said in Saibal v*

5. *Express Newspaper Pvt. Ltd. & Ors v Union of India &Ors* AIR 1968 SC 872
6. PreranaPriyanshu, Media Trial: Freedom of Speech v. Fair Trial, 3 International Journal of Law a d Legal Jurisprudence Studies, 284

B. K. Sen [7] , "*No doubt it would be mischievous for a newspaper to systematically conduct an independent investigation into a crime for which a man has been arrested and to publish the results of the investigation. This is because, trial by newspapers, when a trial by one of the regular tribunal is going on, must be prevented. The basis for this view is that such action on the part of the newspaper tends to interfere with the course of justice.*"

Further contempt of court has also been observed in *Roop Chand Sharma v Avtar Singh Brar* [8] in detail as, "one kind of contempt of court is scandalizing the court itself. Any act done or writing published calculated to bring a court, or a Judge of the court into contempt, or to lower his authority is a contempt of court. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts, is a contempt of court. There may be likewise a contempt of the court in abusing parties who are concerned in causes there or in prejudicing mankind against a party before the cause is heard. In the class of cases of contempt of court where anything is done which is calculated to interfere with the due course of justice or is likely to prejudice the public for or against a party the essence of the matter is the tendency to interfere with the due course of justice. Any publication which is calculated to poison the minds of jurors, intimidate witness or parties or to create an atmosphere in which the administration of justice would be difficult or impossible amounts to contempt."

Even the punishment for contempt of court is so amenable that as per section 12 of the Contempt of Courts Act, 1971, it punishes for simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both: provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court. Given such provisions of our legislation where perpetrators may escape with mere a satisfactory apology, surely the sentinels of our democracy overreaches and assigns itself a role which is way beyond its domain.

Right To Fair Trial And How Does It Get Affected By Media Trial

As far the natural law of justice goes, justice should not only be done, but it also seems to be done. Our criminal jurisprudence is based on two basic principles namely the presumption of innocence in favor of the accused until guilt is proven and guilt should be proven beyond any reasonable doubt.

An accused is entitled to receive a fair trial and our Indian Constitution through Article 20, 21 and 22 ensures that and provides them certain constitutional rights. Article 20 talks about protection in respect of conviction for offences, double jeopardy and self-incrimination.

Article 21 talks about protection of life and personal liberty and its interpretation extends to right to privacy as a fundamental right. Media while exercising its investigative journalism in many cases where it puts alleged accused and other persons involved under microscopic observation, it publishes many personal information related to them which are not pertinent to the ongoing trial at all, thus violating their right to privacy. Such actions of media do not affect only the accused but also the victims and witnesses, like in the case of *Zahira Habibullah Sheikh &Anr vs State of Gujarat &Ors* [9] , there was much required focus on the atmosphere conducive to free trial. Zahira who was projected as the star witness made a grievance that she was intimidated, threatened and coerced to depart from the truth and to make statement in Court which did not reflect the reality. "Witnesses" as Bentham said: are the eyes and ears of justice. It is more pertinent if we see from the perspective, that the witnesses' sanctity and their state of mind has to be protected from external threat and fear because subsequently it is the witness's freedom of expression that becomes the driving factor for the flow of justice. Unregulated media trials could bring life threatsand other such unwarranted notices to the witness that can surely impact his freedom of expression and in turn affect the balance of justice. Though the norms of journalistic conduct by Press Council of India clearly state and direct that witnesses by media should not be given excessive publicity and at the same time media should not identify the witnesses. But the pace with which, the phenomena of media trial is running on its wagon wheel carrying the element prejudice with it, one must not be surprised with the event where media acts in contradiction of these norms as it already has done in many aspects.

Even the victims face many similar issues, as in cases

7. *Saibal v. B.K. Sen* AIR 1961 SC 633
8. *Roop Chand Sharma v. Avtar Singh Brar* AIR 1943 CriLJ 308
9. *Zahira Habibullah Sheikh &Anr v State of Gujarat &Ors* 2004(5) SCC 353

of rape victims if their identity is published it leads to many hardships and social stigmas for them, it's also one of the underlying reasons for non reporting of many such incidents.

In the case of *Police Commissioner Delhi vs Registrar Delhi High Court*[10], it has been held assurance of a fair trial is the first imperative of the dispensation of justice.

Article 22 talks about protection against arrest and detention in certain cases such as right to consult and to be defended by legal practitioner of his choice and every person arrested and detained shall produce before the nearest magistrate within a period of 24 hours. These are certain very important and basic rights available to an accused which in turn ensures them a fair trial. But media trial deprives them of these rights too, as in many high profile cases external pressure are exerted upon the lawyers by portraying the accused as indefensible and despite that if they go on to accept them it tarnishes their reputation like it happened in the case of Jessica Lal, where senior lawyer Ram Jethmalani was very criticized for accepting the brief of accused Manu Sharma. In another case where advocate Abbas Kazmi had accepted the case of Ajmal Kasab, he had to go through many harsh criticisms. We can safely deduce that such actions clearly violate the basic rights of accused and they're deprived of their right to choose legal practitioner of their choice due to availability of limited willing lawyers.

In the case of *Zahira Habibullah Sheikh v. State of Gujarat* [11] , the Supreme Court explained that a "*Fair trial would obviously mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated*."

In *State of Maharashtra vs. Rajendra Jawanmal Gandhi* [12], the Supreme Court observed and very rightly observed:"*There is procedure established by law governing the conduct of trial of a person accused of an offence. A trial by press, electronic media or public agitation is very antithesis of rule of law. It can well lead to miscarriage of justice*." Also this statement in same case by Justice H.R. Khanna: –"*Certain aspects of a case are so much highlighted by the press that the publicity gives rise to strong public emotions. The inevitable effect of that is to prejudice the case of one party or the other for a fair trial is of great relevance here*."

When media goes to the extent of assigning itself the role of judiciary and pronounces judgment, then unlike judicial trials, it basically skips the many steps of legal procedural intricacies and without any substantive evidence declares its verdict, which after wide publication moulds public opinion, then later on while court judgment is given and if that judgment is not in consonance with the media verdict, then it causes public unrest, since they've been fed with an engineered prejudiced information with which they feel emotionally attached and in that case they also feel deprived of the justice and their faith in judiciary falters.

Justice Frankfurter said, "In securing freedom of speech, the constitution hardly meant to create the right to influence Judges & Jurors."The media trial is capable of not only prejudicing the opinion of public but also of those who has been given duty to dispense justice to masses who are supposed to be immune from all these media publication but being a human being, they too are susceptible to such indirect influences, at least sub consciously or unconsciously.

In the case of *M.P. Lohia vs State of West Bengal* [13], what happened was that a woman committed suicide in Calcutta in her parents house but a case was filed against the husband and in-laws under the Indian Penal Code for murder alleging that it was a case of dowry death. The husband (appellant in the Supreme Court) had filed a number of documents to prove that the woman was a schizophrenic psychotic patient. The parents of the woman filed document to prove their allegations of demand for dowry by the accused. The trial was yet to commence. The courts below refused bail. The Supreme Court granted interim bail to the accused and while passing the final order referred very critically to certain news items in the Calcutta magazine. The court deprecated two articles published in the magazine in a one-sided manner setting out only the allegations made by the woman's parents but not referring to the documents filed by the accused to prove that the lady was a schizophrenic. The Supreme Court in this case observed, "*these type of articles appearing in the media would certainly interfere with the course of administration of justice. The court deprecated the articles and*

10. *Police Commissioner Delhi v. Registrar, Delhi High Court* AIR 1997 SC 95
11. *Zahira Habibullah Sheikh &Anr v State of Gujarat &Ors* 2004(5) SCC 353
12. *State of Maharashtra v. Rajendra Jawanmal Gandhi,* AIR 1997 SC 3986.
13. *M.P. Lohia v. State of West Bengal* 2005(2) SCC 686

cautioned the publisher. Editor and Journalist who were responsible for the said articles against judiciary in such trial by media, when the issue is sub-judice and observed that others should take note of the displeasure expressed by the court."

These instances prove that how right to fair trial of the accused is affected by the media trials and it deprives him of his basic right. So if such actions of media remained unchecked and accused is not heard without prejudice and biasness, then we really need to revisit the basics of our democratic principles where everyone is given equal rights.

Suggestive Reforms and Reformatory Measures

There is no doubt in the proposition that media trial is tyrannical and a big obstruction in the flow of justice. Supreme Court has observed several times that a trial by press, electronic media or public agitation is very antithesis of rule of law. It can well lead to miscarriage of justice. [14]

Freedom of the press has always been a cherished right in all democratic countries. The democratic credentials of a state are judged by the extent of freedom the press enjoys in that state. [15]

But the role of media via media trial raises some reasonable catechize and undoubtedly asks for much needed regulatory and reformatory measures.

17th Law Commission of India in its 200th report[16] put forward some recommendations aimed at regulating the media trial and containing the potential damages caused by media trial. The report recommended in favor of training journalists in aspects and law relating to freedom of speech emanating from article 19(1)(a) and permissible restriction under article 19(2). It also recommended inclusion of syllabus consisting of above mentioned issues and issues such as constitutional rights, human rights, defamation and contempt of courts in journalism courses. It also stressed upon the necessity to have diploma and degree courses in Journalism and law. The report also recommends certain changes into The Contempt of Courts Act, 1971 and stress upon inheriting the decision of Supreme Court in ***A.K. Gopalan v. Noordeen*** [17] wherein the Supreme Court held that publications made after the arrest of a person could be criminal contempt if such publications prejudice any trial later in a criminal court and thus strengthening the Section 3 of the contempt act. The Commission likewise recommended that the beginning stage of a criminal case ought to be from the time of arrest of a blamed and not from the timing of filing of charge sheet.

Another notable recommendation of the report which in the opinion of authors is slightly too harsh upon the media houses is to empower the High Court to pass "postponement order" to a print or an electronic media to prorogue distribution or broadcast relating to a criminal case and to control the media from falling back on such production or broadcast.

Furthermore the authors feel that only if the media take its principle and ethics more seriously and observe its norms of journalistic conduct by Press Council of India [18] more devotedly the evils of media trial can be contained at greater extent.

CONCLUSION

The interesting anatomy of article 19(1) (a)is that the freedom of expression as well as freedom of media has its root in this article, yet it often stands face to face and that for very different reasons. While on one hand freedom of expression always empowers the media but on the other hand media in its worst manifestation of freedom in the form of media trial often infringes the right of freedom of expression of certain class of people. Though Press council of India in its norms of journalistic conduct has clearly given guidelines against excessive publicity of victim, accused, witnesses, suspect; against identifying the witnesses as it puts undue pressure on them keeping in consideration their right to privacy, against conducting any trial parallel to judicial trial keeping in view the flow and stream of justice but the very conduct of media in our country is nothing but evident mockery of the norms or principles of journalistic conduct.

The drastic and dangerous consequences of a media trial can be imagined in the situation where the continuous projection of one side of event

14. State of Maharashtra v. Rajendra Jawanmal Gandhi, AIR 1997 SC 3986.
15. Printers (Mysore) Limited v Assistant Commercial Tax Officer, (1994) 2 SCC 434.
16. Law Commission of India, 200th Report on Trial By Media Free Speech and Fair Trial Under Criminal Procedure Code, 1973 (August 2006), available at http://lawcommissionofindia.nic.in/reports/rep200.pdf
17. *A.K. Gopalan and Another v Noordeen* AIR 1970 1694
18. Press Council of India, Norms of Journalistic Conduct (2010), available at http://presscouncil.nic.in/OldWebsite/NORMS-2010.pdf

which may or may not be right but surely , could be, profitable for media houses and continuous feeding to general public in the way suited to media not only results into demonstration of unethical journalism but also impact the thought process of public in a severe manner. Partisan view and causing distortion in people's thought process are not salubrious features of healthy media which is fourth pillar of democracy as it obfuscates the freedom of thought and expression of masses which is often converted into distorted thought and expression with masquerading freedom due to the ill feeding via media trial.

The tyranny of media trial doesn't seem to stop here, it is magnified when we see this in context of any judicial trial. The evil of media trial impacts everyone including witness, accused, victim, suspect and it is safe to say that even judges. This needs to be signified and one has to understand that accused doesn't mean criminal and continuous portrayal of accused as guilty or even in some instances announcing the judgment either in favor or against, even before the courts of law by the media is a seer infringement of not only the process of justice but also the freedom of expression of the accused. Similarly, misery for victim in the form of double victimization where the victim not only suffers in the hands of guilty person but also via media trial and it becomes brutal in rape trials where in the greed or in disdain, victim identity is revealed via media trial. The impact on judges has also been recognized and condemned in many cases and many scholars as Cardozo, one of the great Judges of American Supreme Court observed that the judges are subconsciously influenced by several forces.

For general public, judiciary is not only a place where justice seems to be delivered but also a hope which is eroding gradually and substantial credit for it goes to the rampant media trial and its impact on judges which has been recognized and condemned in many cases as well as by many scholars.

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RIGHTS OF SENIOR CITIZENS IN INDIA

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ABSTRACT

Those were the golden days when elders were revered and respected for their knowledge and had high standing in society. But there is a paradigm shift in this scenario today. The traditional family system is witnessing a disintegration into smaller setups. Nuclear families are increasingly common due to work demands and changing lifestyles. Science and technology has ensured people live beyond a certain age and provide improved healthcare options to the elderly. By 2025, the world will have a greater share of older persons in the population and cross the two billion mark by 2050. In India too, the population of the elderly will cross 18 per cent by 2025. However, rising life expectancy for the elderly has also brought about issues related to their isolation and loss of social relevance. Urbanisation, mobility of working population, mushrooming of nuclear families, and modern lifestyles have all led to the collapse of the traditional family structures. The elderly are increasingly marginalised, with many spending their final years in the confines of old-age homes, where the conditions are nothing short of abysmal many times.

Key words: Human Rights of Elderly People, Hindu Law, Muslim Law, Discrimination and Humiliation.

INTRODUCTION

A recent study by the Agewell Foundation found that the human rights of elderly people are increasingly violated because of the "popularity of nuclear and small families, lack of inter-generational interaction, and non-existence of an inclusive social security system". It is alarming to note that about 86 per cent of senior citizens are unaware of their human rights and only 68.8 per cent have access to necessary medicines and healthcare. Urban areas fare even worse. About 23 per cent were found to be living in inhuman conditions and another 13 per cent lack proper age-appropriate nutrition. Discrimination and humiliation only add to their woes. Those who were once in respectable positions as the head of a family or a business now face issues like disregard, loss of respect in the family, inaccessibility to medicine, security and even depression .[1] "*May god bless you with 100 years of health and happiness*", etc. In India Old Age is a great Celebration in itself. Even today the concept of Elder Abuse is difficult to comprehend in Indian circumstances. But unfortunately it has become an ugly fact of life even in Indian society. Older persons are emotionally abused by Intimidation through yelling or threats, humiliation and ridicule, habitual blaming or scapegoat, ignoring the elderly person, isolating an elder from friends or activities, terrorizing or menacing the elderly person, etc. Ignoring health conditions of elderly, financial exploitation of elderly, sexual abuse are found as other major forms of elderly abuse. The recent example of retired Raymonds tycoon Vijaypat Singhania can be seen who had been entangled in a property dispute (gave his shares in Raymonds worth more than Rs.1000 crore to his son and now living in a rented accommodation) had a message for parents across the country'love your children and care for them but don't love them so much that you are blinded.' The dishonesty and arrogant behavior of his son has hurted him deeply.[2] Major Consequences of elder abuse are as frequent arguments or tension between the caregiver (mostly relatives) and the elderly person & also changes in personality or behavior of the elderly person. Older persons are respected in society in general but within their individual families, majority of older persons feel isolated on many occasions. Property related issues, interference in family matters, interpersonal relations, unemployment in old age, excessive medical expenses, dispute among siblings, greediness of younger generation, fall of morals, etc. are major reasons of disrespect or mistreatment of older persons. Surprisingly,

1. "Honouring Old Age: The elderly too have rights", The Asian Age, Archana Dalmia,Dec.2017
2. "Raymond man Vijaypat Singhania has a message for parents":www.NDTV.com , Aug. 15, 2017,(last retrieved on 2nd March, 2019)

older men are more prone to mistreatment in their respective families and societies. With fast changing socio-economic scenario, industrialization, rapid urbanization, higher aspirations among the youth and the increasing participation of women in the workforce, roots of traditional joint family system has been eroding very fast. In urban areas of the country traditional joint family system has become thing of past. In such changing situations, majority of older people, who have passed most part of their life with their joint/extended families are on the verge of isolation or marginalization in old age. At this age, when they need family support most, they have to live on their own. Even basic needs & rights of many of them are not addressed. Social marginalization, loneliness, isolation and even negligence in old age lead violation of Human Rights of Older people. Ironically, in India older generations are not aware of their human rights due to high prevalence of illiteracy and lack of zero awareness. On the other hand, due to comparatively high physical as well as psychological vulnerability their cries for help remain within four-walls, that's why only a few cases of violation of human rights of elderly come out.[3]

Pan-India surveys have revealed that almost 30 per cent of the elderly are subjected to some form of abuse or neglect, abandonment, and physical, financial or emotional abuse, often by their own family members. Many are left lonely. Yet, the absence of detailed data on crimes against the elderly in official compilations is striking, and points to inadequate focus on the issue.[4]

Difficulties of The Older Persons

The problems faced by the older persons are as follows:

- Economic problems, include such problems as loss of employment, income deficiency and economic security.
- Physical and physiological problems, include health and medical problems,nutritional deficiency and the problem of adequate housing etc.
- Psycho-social problem which cover problems related with their psychological and social maladjustment as well as the problem of elder abuse etc.[5]

Laws For The Protection of Older Persons

International Provisions: According to Art.25 of Universal Declaration of Human Rights: Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Human Rights of Older People

1. Right to life shall be protected by law.
2. Right not to be subjected to inhuman treatment "No-one shall be subjected to torture or to inhuman or degrading treatment or punishment".
3. Right to liberty "Everyone has the right to liberty and personal security.
4. Right to a fair hearing "In the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". "Civil rights and obligations".
5. The right to respect at home, within family and in private life
6. The right to freedom of thought and conscience.
7. The right not to be discriminated against age.
8. The right to property - everyone is entitled to the peaceful enjoyment of his possessions
9. The right to education

UNITED NATION PRINCIPLES

The document 'UN Principles of Ageing' (1982) is considered the basic guideline for promotion of the rights of senior citizens.

The Five Principles Are

Older persons should have access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help. Older persons should have the opportunity to work or to have access to other income-generating opportunities.

a. Older Persons should remain integrated in society and participate actively in the formulation of policies which effect their well-being.

b. Older Persons should have access to health care to help them maintain the optimum level of physical, mental and emotional well-being.

c. Older Persons should be able to pursue opportunities for the full development of their potential and have access to educational, cultural, spiritual and recreational resources of society.

d. Older Persons should be able to live in digni-

3. Human Rights of Older People in India: Reality Check, July 2014
4. "Elders need a fair deal",The Hindu, June 15,2013.
5. "Agewell Study on Human Rights of Older Persons in India." United Nations: Department of Economic and Social Affairs (DESA) - Economic and Social Council (ECOSOC),

ty and security and should be free from exploitation and mental and physical abuse. [6]

Constitutional Provisions

Article 41 : Right to work, to education and to public assistance in certain cases :
The State shall, within the limits of economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.
Article 46 : Promotion of educational and economic interests of ..... and other weaker sections :
The State shall promote with special care the educational and economic interests of the weaker sections of the people.....and shall protect them from social injustice and all forms of exploitation.

PERSONAL LAWS

Hindu law

According to Hindu Law it is the obligation of sons to maintain their aged parents, who were not able to maintain themselves out of their own earning and propert. And this obligation was not dependent upon, or in any way qualified, by a reference to the possession of the family property. It was a personal legal obligation enforceable by the sovereign or the state. Sec 20 of the Hindu Adoption and Maintenance Act, 1956 imposes an obligation on the children to maintain their parents. This obligation to maintain parents is not confined to sons only, and daughters also have an equal duty towards parents. It is important to note that only those parents who are financially unable to maintain themselves from any source, are entitled to seek maintenance under this Act.

Muslim law

Children have a duty to maintain their aged parents even under the Muslim law. According to Mulla:
(a) Children in easy circumstances are bound to maintain their poor parents, although the latter may be able to earn something for themselves.
(b) A son though in strained circumstances is bound to maintain his mother, if the mother is poor, though she may not be infirm.
(c) A son, who though poor, if earning something is bound to support his father who earns nothing.

Christian and Parsi law:
The Christians and Parsis have no personal laws providing for maintenance for the parents. Parents who wish to seek maintenance have to apply under provisions of the Criminal Procedure Code.

The Code of Criminal Procedure

Cr.P.C 1973 is a secular law and governs persons belonging to all religions and communities. Sec. 125 Cr.P.C. talks about the maintenance of parents. Daughters, including married daughters, also have a duty to maintain their parents.

GOVERNMENTAL PROTECTIONS

The Government of India approved the National Policy for Older Persons on January 13, 1999, in order to accelerate welfare measures and empowering the elderly in ways beneficial for them. This policy included the following major steps:
(i) Setting up of a pension fund for ensuring security for those persons who have been serving in the unorganised sector,
(ii) Construction of old age homes and day care centres for every 3-4 districts.
(iii) Establishment of resource centres and re-employment bureaus for people above 60 years.
(iv) Concessional rail/air fares for travel within and between cities, i.e., 30 per cent discount in train and 50 per cent in Indian Airlines.
(v) Enacting legislation for ensuring compulsory geriatric care in all the public hospitals.
2. The Ministry of Justice and Empowerment has announced regarding the setting up of a National Council for Older Person, called Agewell Foundation. It will seek an opinion of aged on measures to make life easier for them.
3. Attempts to sensitize school children to live and work with the elderly. Setting up of around the clock help line and discouraging social ostracism of the older persons are being taken up.
4. The government policy encourages a prompt settlement of pension, provident fund (PF), gratuity, etc. in order to save the superannuated persons from any hardships. It also encourages to make taxation policies elder sensitive.
5. The policy also accords high priority to their health care needs.
6. According to Sec 88-B, 88-D and 88-DDB of Income Tax Act there is a discount in tax for the elderly persons.
7. Life Insurance Corporation of India (LIC) has also

6. https://social.un.org/ageing-working-group/documents/Agewell_Study%20on%20Human%20Rights%20of%20Older%20Persons%20in%20India_April%202011.pdf (Accessed September 2018)http://www.dignityfoundation.com/Rights-Of-Senior-Citizen.aspx (last accessed Oct. 3,2018)

been providing several schemes for the benefit of aged persons, i.e., Jeevan Dhara Yojana, Jeevan Akshay Yojana, Senior Citizen Unit Yojana, and Medical Insurance Yojana.

8. Former Prime Minister A B Bajpai has also launched 'Annapurana Yojana' for the benefit of aged persons. Under this yojana, unattended aged persons are being given 10 kg food for every month.

9. It is proposed to allot 10 per cent of the houses constructed under government schemes for the urban and rural lower income segments to the older persons on easy loan. [7]

The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, placed a legal obligation on children and relatives to enable the elderly to live a normal and dignified life. The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 Maintenance and Welfare of Parents and Senior Citizens Act, 2007 is a legislation enacted in 2007, initiated by Ministry of Social Justice and Empowerment, Government of India, to provide more effective provision for maintenance and welfare of parents and senior citizens. This Act makes it a legal obligation for children and heirs to provide maintenance to senior citizens and parents, by monthly allowance. This Act also provides simple, speedy and inexpensive mechanism for the protection of life and property of the older persons. After being passed by the parliament of India received the assent of President of India on December 29, 2007 and was published in the Gazette of India on December 31, 2007.Some states have already implemented the act and other states are taking steps for implementing this Act. Objects of the Act. This Act provides in-expensive and speedy procedure to claim monthly maintenance for parents and senior citizens. This Act casts obligations on children to maintain their parents/grandparents and also the relative of the senior citizen to maintain such senior citizens. The main attraction of this Act is there are provisions to protect the life and property of such persons. This Act also provides setting up of old age homes for providing maintenance to the indigent senior citizens and parents. This Act extends to the whole of India except Jammu & Kashmir state. Definitions Children- Include son, daughter, grandson, granddaughter but does not include a minor Maintenance includes provision for food, clothing, residence, medical attendance and treatment Parent- means father or mother whether biological, adoptive or step father or step mother, whether or not father or mother is a senior citizen Senior citizen- means an Indian who attained the age of 60 years or above Relative- means any legal heir of childless senior citizen who is not a minor and is in possession of or would inherit his property after his death Welfare- means provision for food, healthcare, recreation centers and other amenities necessary for senior citizens Maintenance of Parents and senior citizens A senior citizen including parent who is unable able to maintain himself from his own earning or out of the property owned by him, is entitled to get relief under this Act. Children/grand children are under obligation to maintain his or her parent, father, mother or both. Likewise, relative of a senior citizen is also bound to look after the senior citizen. If such children or relative is not maintaining his parents or senior citizen respectively, then the parents/senior citizen can seek the assistance of Tribunal constituted under this Act, to enforce the remedy of maintenance. Such parents/ senior citizen can file an application before the Tribunal, claiming maintenance and other reliefs from their children/relatives as the case may be. Such application for maintenance can be filed by the senior citizen or a parent himself, or if such person is incapable, then by any other person or any registered organization authorized by him. The Tribunal can also suo motu take cognizance of the case. After receiving the application the Tribunal may issue notice to the respondent-children/relative and provide them time to furnish their reply. Such application for maintenance should be disposed of within 90 days from the date of service of notice of application to the respondent. However, the Tribunal can extend time for a maximum period of 30 days in exceptional circumstances after recording reason. The Tribunal is having power to allow interim maintenance pending disposal of the case. Even though the application can be filed against any of children/relative as the case may be, such respondent-children/relative can imp lead other persons who are liable to pay maintenance. If such children/relative who is directed to pay maintenance fail to comply with the order of tribunal without sufficient cause, the Tribunal may issue warrant for levying the due amount from them in the manner levying fines and can also sentence the erring respondent to imprisonment that may extend to one month or until payment made whichever is earlier. The Tribunal will not issue Warrant to execute the order of maintenance, if such petition for execution is filed after a period of 3 months from the date on which the maintenance is due. The application under this Act can be filed before the Tribunal in any district, where the applicant resides or last resided

7. "Concessions and Facilities given to Senior Citizens." Ministry of Social Justice and Empowerment, Government of India. (Accessed December 2,2018).

or where children or relative resides. The evidence of proceedings shall be taken in the presence of children/relative against whom relief is sought and if such respondent is willfully avoiding service of summons or neglecting to attend the Tribunal, the Tribunal may proceed and determine the case ex parte. If the Tribunal is satisfied that such children/relative against whom such application for maintenance is pending, neglect or refuses to maintain the parents/ senior citizens as the case may be, may order such children/relative to pay monthly allowance to such applicant. The maximum amount of maintenance that can be allowed by the Tribunal is Rs.10,000 per month The tribunal has power to alter, modify or cancel the order in appropriate circumstances. The Tribunal has also power to levy interest on the maintenance amount, which shall be not less than 5% and greater than 18%. Aggrieved by the order of Tribunal, senior citizen/parent can file appeal before Appellate tribunal within a period of 60 days and if the Appellate tribunal is satisfied that there occurred some delay in filing appeal due to sufficient cause, the appeal can be entertained. Protection of life and property of Senior citizen If a senior citizen after the commencement of this Act, has transferred his property either moveable or immovable, by way of gift or otherwise, subject to the condition that the transferee shall provide him basic amenities and physical needs and thereafter such transferee reuses or fails to provide such promise, such transfer of property shall be deemed to have been made by fraud, coercion or undue influence and the Tribunal can declare such transfer as void. Before the enactment of this law, a senior citizen's only remedy in such a case was to approach the court for maintenance from the children to whom he had given the property by way of gift or otherwise and such property would be the exclusive property of the transferee and the senior citizen had no right in such property. But after the enactment of this Act, a senior citizen can reclaim his property from the transferee the concerned police personnel will also ensure priority in dealing with these types of cases. Abandoning a senior citizen in any place by a person who is having the care or protection of such senior citizen is a criminal offence and such person shall be punishable with imprisonment for a term which may extend to three months or fine which may extend to five thousand rupees or both. This Act also provides that state governments may establish old age homes at least one in one district to accommodate indigent senior citizens. State governments may also ensure proper medical care for senior citizens. The Act also has provisions to ensure the state takes care of them, but in practical terms these are hardly of any help.

The real issues that older citizens face remain unaddressed. Children don't have enough time to spend with the older generation and are also unable to decide whether to put them in old-age home. It's a little different in rural areas due to lack of any such choices. Those in the upper strata of society fear sending the elderly away primarily due to the social stigma involved. But even within their own homes, they lack respect and the basic ingredients that can help them live their golden years in peace. Old age was a period of celebration in earlier times. Although elderly abuse and denial of rights to them is difficult to digest in an Indian setting, it is slowly becoming an ugly reality. Confined within the four walls of their homes, their voices often remain unheard. The fact that one's own children often choose to harass their parents is truly shocking. Other factors that exacerbate the situation are lack of a proper social security system, including good healthcare facilities. Many senior citizens still have no access to primary healthcare in old age. India needs to take a serious look at the needs of the elderly in a more pragmatic and holistic manner. The urgent need of the hour is an inclusive social security system for the elderly at the grassroots level, utilising tools like value-based education, awareness generation, research and advocacy in order to protect the human rights of senior citizens. There is a need to create viable spaces for the elderly, which would have day care as well as stay-in facilities. Spaces for the elderly should have safe communities with friendly and cheerful surroundings. These spaces should be such that they can lead an active social life and indulge in recreational activities. There is a need to make available trained staff who can deal with their healthcare issues and medical emergencies. Thus, elderly citizens have the right to live with dignity and spend the golden years of their life at peace.

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IMPLEMENTATION OF HUMAN RIGHTS IN INDIA: PROBLEM AND ITS SOLUTION

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ABSTRACT

Human rights are those rights which are given to any individual due to only one reason that 'He' or 'She' is born as a human being. Human rights are the rights that are very crucial for human life. Human rights will be rights to specific cases and flexibilities for every single person everywhere throughout the world. These rights other than being principal and widespread in character, expected universal measurement. These rights give guarantee to make a man free. Universal nature of rights with no qualification of any kind is an element of human rights these rights perceive the essential human needs and demands.

Key words: Human Rights, Essential Rights, Poise, Decency, Fairness, Regard and Freedom.

INTRODUCTION

Each nation ought to guarantee human rights to its people. The human rights should discover its place in Constitution of each nation. Since, the times of the Indus Valley Civilization, Indian culture has been the result of a union of different societies and religions that came into contact with the tremendous Indian sub-landmass over an extended length of time. According to Jawaharlal Nehru there is "*a whole congruity between the most present day and the most antiquated periods of Hindu idea reaching out more than three thousand years*" [1]. The privileges of man have been the worry of all human advancements from time immemorial. "*The idea of the privileges of man and other basic rights was not obscure to the general population of prior period.*" [2] The Babylonian Laws and the Assyrian laws in the Middle-East, the "Dharma" of the Vedic period in India and the law of Lao-Tze and Confucious in China have championed human rights all through the historical backdrop of human progress. The Indian idea sees the individual, the general public and the universe as a natural entire, everybody is an offspring of god and all living creatures are identified with each other and have a place with an all-illusive family. In this specific situation, Father of Nation Mahatma Gandhi said –" *I would prefer not to think as far as the entire world. My patriotism incorporates the benefit of humanity when all is said in done. In this way my administrations of humanity*"[3] .

HUMAN RIGHT: MEANING

Human rights mean the dignity of a man, implies ensuring singular rights, shielding individuals from whatever other separation that forbids their rights, and mental harm, that sickens or damages. The approach good is to think, 'I have to regard the person. We would prefer not to hurt this individual.' What strikes to mind when we think about our childhood is great injustice and segregation, and there is a need to advance extraordinary dignity.

Human rights will be rights inherent to every individual, irrespective of nationality is, place of living arrangement, sex, national or ethnic starting point, colour, religion, language or some other status. These rights are altogether interrelated, associated and unified. These essential rights depend on shared qualities like poise, decency, fairness, regard and freedom. These qualities are characterized and ensured by law of the land.

Human rights are usually comprehended just like those rights which are natural in the simple reality of being human. The idea of human rights depend on the conviction that each individual is qualified to make the most of his/her rights without segregation. Both nationally and internationally and everywhere

1. Jawaharlal Nehru. The Discovery Of India, 2nd Ed. (New Delhi Jawaharal Nehru Memorial Fund, 1992.)
2. Attar Chand, Politics Of Human Rights And Civil Liberties – A Global Survey (Delhi : UDH Publishers.
3. Jawaharlal Nehru The Discovery Of India, 2nd Ed. (New Delhi Jawaharal Nehru Memorial Fund, 1992) 420

throughout the world and everywhere throughout the world, human rights have now turned into a live issue. The foundational standard overseeing the idea of human rights is that of the regard for human identity and its total worth, paying little mind to shading race, sex, and religion and different contemplations. Human rights are generally thought to be thoseessential good privileges of the individual that are fundamental for an existence with human pride and dignity. These rights are fundamental for the sufficient improvement of human identity and for human satisfaction. The points of an all-inclusive arrangement of human rights is to revise and restore human nobility in all social orders, where political and financial persecution exists and to soothe human wretchedness, to enhance and refine human life in all over the world. Without getting included definitional contentions, subsequently, human rights might said to be those central rights to which each man or lady possessing any piece of the world ought to be esteemed entitled just righteousness of having being conceived an individual. With the person as their perspective human rights look to ensure to the individual the base essential condition for seeking after an unmistakeably human life. As indicated by Francis Fukuyama, all people have a drive to be regarded, and that a definitive type of individual regard discovers fulfilment in the possibility of human rights. He contends that the procedure of history drives people towards affirmation of human poise. As indicated by him, it is the liberal just world that gives the perfect conditions to defend human rights[4].

David Selby says, "human rights relate to all people and are postured by everone on the planet since they are individuals, they are not earned, purchased or acquired, nor are they made by any legally binding effort".human rights are concerned with the dignity of the individual the level of self-esteem that secures personal identity and promotes human community.

Plato and Olton have stated that human rights are those rights, which are considered to be absolutely essential for the survival, existence and personality development of human beings. According to Scot Davidson, the concept of human rights is closely connected with the protection of individual from the exercise of state government or authority in certain areas of their lives; it is also directed towards the creation of social conditions by the state in which individuals are to develop their fullest potential.

In the words of **M. Freeden**, human right is a conceptual device, expressed in linguistic form that assigns priority to certain human or social attributes regarded as essential to the adequate functioning of a human being that is intended to serve as a protective capsule for those attributes; and those appeals for a deliberate action to ensure such a protection. Human right is an old issue from numerous point of view. Most major, it is one approach to manage a man's and people's connection to open expert and for sure to whatever, remains of the general public. In the event that one has a human right, one is qualified for make a major claim that a scientist, or some other pieces of the general public, do or avoid accomplishing something that influences altogether one's human respect.

Therefore, the talk of human rights winds up intertwined with an exchange of formative procedures. In any case what is advancement? To rest, to dream, perchance to create; here is the rub. What is improvement? The numerous originations of advancement drifting around in monstrous writing are themselves the methods for misuse. That is the reason one is more alright with the articulation devastating social orders. Without a doubt, the purposes behind all, these are extremely perplexing to allow any whipping kid, substitute clarifications. Whatever it might be made to mean, development should at any rate mean this: individuals will be given the privilege to be and stay human. Add up to and proceeding with dejection and impoverishment open to individuals to lost their mankind. In general, public that considers human rights important ought to there be permitted a situation where individuals progress towards becoming sub-human that is, the point at which they perforce need to surrender even those reasonably recounted basic privileges of man, where individuals offer their spouses, kids or themselves with a specific end goal to survive or surrender the life. The articulation human rights surmise a level at which organic elements is presented with the respect of being called human. The bearers of human rights must have understood ideal to be and stay human, permitting them self-governance of decision and arranging survival of themselves.

HUMAN RIGHTS IN INDIA: ORIGIN

The Buddhist percept of peacefulness indeed and thought, says Nagendrasingh "*Is a helpful tenet second to none, going back to the 3rd Century BC*" [5]. Jainism excessively contained comparable conventions.

4. NickiketaSingh,"Human Rights: Various Meanings" In TapanBiswal Human Right, Gender And Environment, Viva Book, New Delhi, 2006.
5. Nagendra Singh, EnforecementOf Human Rights (Calcutta: Eastern Law House Pvt. Ltd, (1986).

As indicated by the Gita "*he who has no hostility to anybody who is cordial and sympathetic who is free from vanity and self-sense and who is even disproved in agony and delight and patient*" is of high repute to God. It likewise says that godlikeness in people is spoken to by the excellences of peacefulness, truth, flexibility from outrage renunciation, repugnance for blame discovering sympathy to living being opportunity from Greed, tenderness unobtrusiveness and consistent quality - the characteristic that a decent person should have.[6] The verifiable record of antiquated Bharat demonstrates certain that human rights were as waste show in the old Hindu and Islamic Civic establishment as in European Christian development. Ashoka, The Prophet Muhammad (S.A.W) and Akbar can't be prohibited from the history of human rights[7] was obscure to India. In general, the point antiquated Indian state might be said to have been less to present an enhanced social request. At the point to act in similarity with the built up moral order". [8] Duty isn't a despot , however an image of respect to be released with certifiable delight. The acknowledgement of this immense point of view is guaranteed in dharmashastras by the brilliant plan or co appointment of lead adjusted to various conditions status and circumstances of life.

According to Nagendra, "*The individual in ancient India existed as a citizen of the state and in that capacity, he had both right and obligation. These rights and duties have largely been expressed in terms of duties (Dharma) - duties to oneself, to one family, to other fellowmen, to the society and the world at large. The basis of the Ancient HumanRights jurisprudence was Dharma- the ideal of ancient Indian legal theory was the establishment of socio-legal order free from traces of conflict, misery. Such a law of "Dharma" was a model for the universal legal order*." [9]

FUNDAMENTAL RIGHTS AND HUMAN RIGHTS

An exceptional element of the Indian Constitution is that an expansive piece of human rights is named as Fundamental Rights, and the privilege to uphold Fundamental Rights itself has been made a Fundamental Right. The Fundamental Rights in the Indian Constitution constitute the Magna Carta of individual freedom and human rights. The Fundamental Rights under Articles 14-35 of the Constitution give singular right in view of appropriate to equity, ideal to opportunity, ideal against misuse, ideal to flexibility of religion, ideal to social and instructive rights. These rights can be summed up in to following classifications:

a) RIGHT TO EQUALITY (ART. 14-18 OF CONSTITUTION OF INDIA):

Ideal to uniformity is the foundation of human rights in Indian Constitution. While Article 14 states that "the state shall not deny to any person equality before the law and equal protection of the laws within the territory of India,[10] Article 15 gives to much more specific details that the state shall not discriminate against any citizen on the grounds of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainment. Whereas, Article 16 states that "there shall be equal opportunity for all citizens in matters relating to employment or appointment to any office under the state.[11] Article 17 and Article 18 directs the state to abolish untouchability and titles respectively.

b) RIGHT TO FREEDOM (ART. 19-22 OF CONSTITUTION OF INDIA):

The rights to flexibility under Articles 19-22'.are the spirit of the human right in India. Altogether, Article 19 states that "all citizens shall have the right to of speech and expression; to assemble peacefully and without arms; to form associations or unions: to move freely throughout the territory of India: to reside and settle in any part of the territory of India; and to practice any profession or to carry on any occupation, trade or business.[12] Whereas, Article 20 says that "no person shall be convicted of any offence except for violation of a law at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."[13] However, the most important article of human freedom is stated in Article 20, which says that "no person shall be deprived of his life or personal liberty except according to the procedure established by law."

c) RIGHT AGAINST EXPLOITATION (ART. 23-24 OF CONSTITUTION OF INDIA):

The Constitution under Articles 23-24, specifies a

6. S. Radhakrishnan(Trans.) The Bhagavadagita (London: George Allen And Unwin, 1958).
7. Yogesh K. Tyagi, "Third World Response To Human Rights, "Indian Journal Of International Law , Vo . 21 No. 1 (January-March 1981.)
8. P. B. GajendraGadkar, The Historical Background and theoretic basis of hindu law – the cultural heritage of india vol. II (Bombay: Asia publishing house, 1965)
9. S. N. Dhyani Fundamentals Of Jurisprudence : The Indian Approach (Allahabad: Central Law Agency, 1992)
10. 10 E. Welch, Jr, and V. A Leary (ed), Asian Perspective on Human Rights, Western Press, Oxford, 1990
11. D.D. Basu, 256
12. P. Diwan, and P. Diwan, human Rights and the Law -Universal and Indian, Deep & Deep Publications Pvt. Ltd., New Delhi 1998
13. P L Mehta , Verma , N Human Rights Under the Indian Constitution, , Deep & Deep Publications Pvt. Ltd., New Delhi 1998.

rundown of rights that denies abuse, human trafficking and comparable such misuses. Article 23 prohibits traffic in human beings and beggar and other forms of forced labour. The Constitution of India, instead of using the Article 24 of the Constitution prohibits the employment of the children below 14 years of age in any factory or mine or in any other employment. Thus, forced labour is prohibited and children have been prohibited and children have been protected as a matter of fundamental rights.

d) RIGHT TO FREEDOM OF RELIGION (ART. 25-28 OF CONSTITUTION OF INDIA):

The Constitution under Articles 25-28 endorse for certain religious flexibilities for residents. They incorporate flexibility of still, small voice of free quest for calling, practice and engendering of religion, opportunity to oversee religious issues, flexibility to instalment of charges for advancement of a specific religion and opportunity as to participation at religious direction or religious love in certain instructive organizations. To put it plainly, these are indispensable privileges of religious minorities in India.

e) CULTURAL AND EDUCATIONAL RIGHTS (ART. 29-30):

Article 29 and 30 of the Constitution ensures certain social and instructive rights to the minority segments. While Article 29 ensures the privilege of any area of the subjects dwelling in any piece of the nation having an unmistakable dialect, content or culture of its own, and to monitor the same, Article 30 gives that "all minorities, regardless of whether in view of religion or dialect, might have the privilege to set up and oversee instructive establishments of their decision". To put it plainly, these are essential rights, as far the security of human privileges of minority bunches in a majoritarian culture like India.

(f) UNENUMERATED FUNDAMENTAL RIGHTS:

The Indian Constitution has particularly identified all the principal rights. In case of ***Birma v. State of Rajasthan***[14] it was held that "treaties which are part of international law do not form part of the Law of the land, unless explicitly made so by the legislative authority." Further in *Shiv Kumar Sharma and others v. Union of India*[15] the Delhi High Court held that in India treaties do not have the force of law, and consequently obligations arising therefrom will not be enforceable in municipal courts unless backed by legislation. In *A. D. M. Jabalpur V. S. Shukla*[16] the Supreme Court by a majority of four to one, held that the Constitution of India did not recognise any natural or common law rights other than that expressly conferred in the Constitution. The attitude of the Supreme Court has changed especially after 1978. The courts on many occasions by accepting the rule of judicial construction have held that regard must be paid to International Conventions and norms for constructing domestic law. In *Maneka Gandhi v. Union of India,* [17] Justice Bhagwati in the Special Bench for the Supreme Court observed that:

The expression 'personal liberty' in article 21 is of the widest amplitude and it covers a variety of rights, which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19. No person can be deprived of his right to go abroad unless there is a law made by the State prescribing the procedure for so depriving him and the deprivation is affected strictly in accordance with such procedure.

The accompanying are the rights contained in the Covenant on Civil and Political Rights. They are accessible to the subjects of India through legal choices; however they are not particularly specified in the Constitution.

1.Right to travel abroad (Article 21) the right to travel abroad is a guaranteed right under Article 12 paragraph (2) of the Covenant on Civil and Political Rights. In *Sathwant Singh Sawhney V. D. Ramanathan,* Assistant Passport Officer, New Delhi,[18] the Court held that the right to go abroad is part of an individual's personal liberty within the meaning of Article 21. Right to privacy (Articles 21 and 19 (1) (d)) this right is stipulated under Article 17 paragraph (1) of the Covenant on Civil and Political Rights. In ***KharakSingh v. State of Uttar pradesh***[19] it was held by the Supreme Court that the 'domicil-

14. A.I.R. 1951 S.C. Rajasthan 127
15. A.I.R. 1968 S.C. Delhi 64
16. A.I.R 1976 S.C. 1263
17. A.I.R 1978 S.C. 597
18. A.I.R. 1967 S.C. Delhi 1836
19. A.I.R. 1963 S.C. 1295

iary visits' is an infringement of the right to privacy and is violative of the citizen's fundamental rights of personal liberty guaranteed under Article 21.1Right against solitary confinement

2. Right to human dignity
3. Right to free legal aid in a criminal trial
4. Right to speedy trial .
5. Right against handcuffing
6. Right against delayed execution
7. Right against custodial violence
8. Right against public hanging
9. Right to health care or doctor's assistance
10. Right to shelter
11. Right to pollution free environment
12. Freedom of the press
13. Right to know
14. Right to compensation
15. Right to release and rehabilitation of bonded labour
16. Right of inmates of protection homes
17. Right of not to be imprisoned for inability to fulfil a contractual obligation. In ***Jolly George Varghese v. Bank of Cochin***[20] it was held by the Supreme Court that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is a violation of Article 21.

g) RIGHT TOEDUCATION: CHILD

Right to Child Education (Article 21 A) is a new human right, which is included in the Constitution by the Eighty Sixth Constitution Amendment Act, 2002. In order to make the right to free and compulsory education to a child, the Constitution's 83rd Amendment Bill 1997 was introduced in RajyaSabha to insert a new article 21(A) in the Constitution. However, the Bill was withdrawn on November 27, 2001. The Constitution 93rd Amendment Bill 2001 was introduced and passed by unanimous vote in the Lok Sabha on November 28, 2001 and the RajyaSabha on May 14, 2002 with formal amendments as 86th Constitutional amendment. According to Article 21(A), the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. Before the Constitutional process started for making the right to education a fundamental right, the Supreme Court in J. P. Unnikrishnan and The State of Andhra Pradesh"[21] held that every citizen of this country has the right to free education until he completes the age of eighteen years.

HUMAN RIGHTS: JUDICIAL RESPONSE

Judiciary in each nation has a commitment and a Constitutional Responsibility to secure Human Rights of nationals. According to the order of the Constitution of India, this capacity is allocated to the unmatched legal in particular the Supreme Court of India and High courts. The Supreme Court of India is maybe a standout amongst the most dynamic courts when it comes into the matter of assurance of Human Rights. It has incredible notoriety of autonomy and validity. The introduction of the Constitution of India typifies the targets of the Constitution-producers to fabricate another Socio-Economic request where there will be Social, Economic and Political Justice for everybody and uniformity of status and open door for all. This essential target of the Constitution orders each organ of the express, the official, the governing body and the legal working agreeably to effort to understand the goals concretized in the Fundamental Rights and Directive Principles of State Policy.

Judiciary has turned into a vanguard of human rights in India. It plays out the capacity fundamentally by imaginative elucidation and utilization of the human rights arrangements of the Constitution. The Supreme Court of India has in the case *Ajay Hasia v. Khalid Mujib*[22] declared that it has a special responsibility, "*to enlarge the range and meaning of the fundamental rights and to advance the human rights jurisprudence.*"

As has just been called attention to the Supreme Court of India and the State High Courts have wide powers under the Constitution to implement the essential rights and they have generously translated these forces. 'Me real commitments of the legal to the human rights statute have been two-fold: (a) the substantive expansion of the concept of human rights under Article 21 of the Constitution, and (b) the procedural innovation of Public Interest Litigation.

a) ARTICLE 21: LIBERAL AND BENEFICIAL INTERPRETATION

Article 21 peruses as takes after, security of life and

20. A.I.R. 1980 S.C. 470
21. AIR 1993 S.C. 645 at 733
22. A.I.R. 1981 S.C. 487 at 493

individual freedom - "*No person shall be deprived of his life or personal liberty except according to the procedure established by law*." The expansion of Article 21 of the Constitution has taken place in two respects:

a) The articulation "the procedure established by law" got another translation not planned by the establishing fathers of the Constitution In 1950, the very first year of the Constitution, the Supreme Court in case *A.K. Gopalan v. State of Madras*, [23] reflecting on the intentions of the Constitution-makers, held that "procedure established by law" only meant that a procedure had to be set by law enacted by a Legislature. This phrase was deliberately used in Article 21 in preference to the American "Due Process" clause. three decades later, in ***Maneka Gandhi v. Union of India case***, the Supreme Court noted that "the Supreme Court rejected its earlier interpretation and holds that the procedure contemplated under Article 21 is a right, just and fair procedure, not an arbitrary or oppressive procedure."[24] The procedure, which is reasonable and fair, must now be in conformity with the test of article 14 - "in effect it has become a Due Process." There is no doubt that the experience of National Emergency (1975-1977) prompted the court to go all out for vindication of human rights. Since then every case of infringement of rights by the Legislature has undergone judicial scrutiny in terms of the new interpretation laid down in the Maneka Gandhi's case. Further, this approach has led to procedural due process innovations such as the right to claim legal and for the poor and right to expeditious trial.

b) The legal deciphers the privilege to life and individual freedom' to incorporate every single essential condition for an existence with respect and freedom. Such an approach enables it to descend intensely on the arrangement of organization of criminal equity and law authorization. It also brings into the fold of Article 21 all those directive principles of state policy that are essential for a "life with dignity." Thus, the judiciary has interpreted "Life" to include the tight to possession of each organ of one's body and a prohibition of torture or inhuman or degrading treatment by Police. In the ***Francis Coralie Mullin v. The Administrator, Union territory of Delhi***[25] case, the Supreme Court held that "life" couldn't be restricted to mere animal existence, or physical survival. The right to life means the right to live with dignity and all that goes with the basic necessities of life such as adequate nutrition, clothing, shelter and facilities for reading, writing and expressing oneself. Many of the Article 21 cases that came before the High Courts and the Supreme Court often revealed "a shocking state of affairs and portray complete lack of concern for human values " The HusanaraKhatoon v Home Secretary, Bihar case.[26] It has been held by the Supreme Court that though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21, which deals with the 'right to life and liberty'. Justice Bhagwati held "if a person is deprived of his liberty under a procedure which is not 'reasonable', 'fair' or 'just', it would fall foul of Article 21. There can, be most likely that expedient trial, and by rapid trial mean sensibly speedy trial, is an indispensable and basic piece of the central idea to life and freedom revered in Article 21. It was additionally held by the Supreme Court that 'confinement in prison for a period longer than what they would have been condemned for, if indicted, is illicit similar to an infringement of their principal directly under Article 21 of the Constitution. *Deoraj Khatri v. State of, Bihar case*[27] raised the case of Police brutality in which 80 suspected crimi,131, were brutally blinded during Police investigation (bhagalpur winding case). The Supreme Court condemned it as a "barbaric act and a crime against mankind." In *SheelaBarse v. The State of Maharashtra case*,[28] the Court was confronted with the custodial violence against women and it is laid down certain guidelines against torture and ill treatment of women in Police custody and jails. The Supreme Court has also read into Article 21 a right to monetary compensation for deprivations of the right to life and liberty suffered at the hands of the State. It was highlighted in the *Rudal Shah v. State of Bihar case*.[29] The development of the privilege to remuneration has invalidated one of the reservations made by India in its instrument of increase to the human rights Covenants, which expressed that the Indian law did not perceive such a privilege in case of right hardship. The health problems of workers in the asbestos industry led the Supreme Court in the case ***ParamanandKatra v. Union of India*** to rule that,the right to life and liberty under Article 21 also encom-

23. A.I.R 1950 S.C. 27
24. A.I.R. 1978 S.C. 597
25. A.I.R. 1981 S.C.746
26. A.I.R 1979 S.C. 1360 - 1369
27. A.I.R. 1981 S.C. 928
28. A.I.R. 1983 S.C. 1514
29. A.I.R. 1983 S.C. 1986

passes the right of the workers to health and medical aid.[30] The right to life has been held to include the right to receive instantmedical aid in case of injury and the right of a child to receive free education up to the age of fourteen.

b)Public Interest litigation and Human Rights

The conventional decide is that the privilege to move the Supreme Court is just accessible to those whose Fundamental Rights are encroached. A man who isn't keen on the topic of the request has no Locus Standi to summon the ward of the court. Be that as it may, the Supreme Court has now impressively changed the above manage of Locus Standi. The court currently allows", general society energetic people to record a writ appeal to for the authorization of Constitutional and statutory privileges of some other individual or a class, if that individual or a class can't summon the ward of the High Court because of neediness or any social and monetary incapacity. The broadening of the customary run of Locus Standi and the creation of Public Interest Litigation by the Supreme Court was a huge stage in the requirement of Human Rights.

In *S.P. Gupta vs. Union of India* and others"[31] the seven members Bench of the Apex Court held that any member of the public having "sufficient interest" can approach the court for enforcing the Constitutional or legal rights of those, who cannot go to the court because of their poverty or other disabilities. A person need not come to the court personally or through a lawyer. He can simply write a letter directly to the court complaining his sufferings. Speaking for the majority Bhagwati, J. said that any member of the public can approach the court for redressal where, a specific legal injury has been caused to a determinate class or

group of persons when such a class or person are unable to come to the court because of poverty, disability or a socially or economically disadvantageous position. In the instant case, the court upheld the right of lawyers to be heard on matters affecting the judiciary. By the judgement Public Interest Litigation became a potent weapon for the enforcement of "public duties" where executed inaction misdeed resulted in public inquiry while extending the extent of the "Locus StandiBhagwati J. expressed a note of caution and observed -but we must be careful to see that the member of the public, Who approaches the court in case of this kind, is join, bonfire and not for personal gain or private profit or political motivation or other considerations. The court must not allow its process to be abused by politicians and other". Consequently, the court knew that this liberal run of Locus Standi may be abused by personal stakes. Because of this expansive perspective of Locus Standi allowing public Interest Litigation or Social Action Litigation, the Supreme Court of India has extensively extended the extent of Article 32 of the Constitution. The Supreme Court has purview to give a suitable solution for the distressed people in different circumstances. Assurance of asphalt and ghetto occupants of Bombay, change of conditions in prisons, instalment of Minimum Wages, insurance against Atrocities on Women, Bihar blinding case, Flesh exchange defensive home of Agra, Abolition of Bonded Laborers, Protection of Environment and Ecology are where the court has issued suitable writs, requests and course based on Public Interest Litigation.

The technique of Public Interest Litigation has been advanced by this court with a view to bringing equity inside the simple reach of poor People and burdened segments of the community[32]. In Peoples Union for Democratic Rights versus Association of India[33], the Supreme Court held that Public Interest Litigation is brought under the watchful eye of the court the court not for motivation behind authorizing the privilege of one individual against another as occurred on account of conventional prosecution, however it is expected to advance and vindicate open intrigue, which requests that infringement of Constitutional or legitimate privileges of expansive number of individuals who are poor, unmindful or in a socially or monetarily Disadvantageous position ought not go unnoticed and unredressed. In BandhuMuktiMorcha versus Association of India"[34] the Apex Court held that the energy of the Supreme Court under Article 32 incorporates the ability u to choose Commission for making enquiry into actualities identifying with the infringement of Fundamental Rights. The Apex Court additionally held that Public Interest Litigation through a letter ought to be allowed, yet communicated the view that, in engaging such peti-

30. A.I.R. 1989(4) S.C.C. 286
31. A.I.R. 1982 S.C 149
32. Bihar Legal Support Society Vs Chief Justice Of India (1986) 4 SCC 767
33. A.I.R. 1982 SC 1473
34. AIR 1984 SC 803

tions, the court must be mindful so that, it won't not be mishandled. The court recommended that every single such letter must be routed to the whole court and not a specific judge and besides it ought to be engaged simply after legitimate check of materials provided by the solicitor. This is known as epistolary ward.

The coming of Public Interest Litigation (here in after alluded to as PIL) is one of the key parts of the approach of "Legal Activism" that is credited to the higher legal in India. The decision of Bhagwati, J. in M.C. Mehta versus Association of India[35], opened the entryways of the Apex Court of India for the persecuted, the abused and the down — trodden in the towns of India or in urban slums. The poor in India can look for requirement of their Fundamental Rights from the Supreme Court by composing a letter to any judge of the court even without the help of an Affidavit. The court has conveyed lawful guide to the entryway ventures of a huge number of Indians which the official has not possessed the capacity to do in spite of that, a ton of cash is being spent on new lawful guide plans working at the local alai stale. An investigation of the eminent instances of the Supreme Court talk about the way that the Indian legal has embraced solid slants for Public Litigation and the working of legal uncovers that it has practiced its forces in the most innovative way and connoted new techniques to guarantee the insurance of Human Rights to the general population. The Supreme Court of India has utilized the technique of Public Interest Litigations as a guide to authorize the privileges of detainees, labourers, retired people, casualties of etiological contamination and others. The Public Interest Litigation assumes a critical part in guaranteeing the Principle of Rule of Law by making the organization is responsible to the general population. The Supreme Court of India in *Narmada BachaoAndolan v Association of India*[36] held that Public Interest Litigation was an innovation basically to shield and ensures the Human Rights of those individuals who were not able secure themselves. In the ongoing past Public Interest Litigation has procured another measurement. Aside from securing a few non legitimate socio financial rights as ensured under the Fundamentals Rights, the Supreme Court has as often as possible depended on a novel element in the field of Human Rights law, for example, Compensatory statute, legal law making with a view to secure equity to the down trodden and furthermore to the mistreated individuals. Open Interest Litigation is a weapon which must be utilized with care and alert. The legal must be to a great degree cautious to see that whether it contains open intrigue or private personal stake. It is to be utilized as a compelling weapon in the arsenal of law for conveying social equity to nationals. The system of Public Interest Litigation ought not be utilized for suspicious results of evil. It ought to be gone for the redressal of bona fide open wrong or open damage and not publicity arranged or established on indivisual vendetta[37].

There have been as of late, progressively examples of mishandle of public Interest Litigations. In this way, there is a need to re-accentuate the parameters inside which Public Interest Litigation can be turned to by a solicitor and engaged by the court. It was basically intended to ensure essential Human Rights of weak and hindered. Open Interest Litigation has not been moved under camouflage with some ulterior thought process or some reason. The courts are presently forcing moderate to overwhelming expenses in instances of abuse of Public Interest Litigation which ought to be an eye opener for non— genuine Public Interest Litigation mover. The best commitment of Public Interest Litigation has been to upgrade the responsibility of the administrations towards the Human Rights of poor people. Open Interest Litigation grills power and makes the courts as individuals' court. The Supreme Court of India in various vital choices has essentially extended the extension and wilderness of Human Rights. Open intrigue matters today concentrate increasingly on the interests of the Indian working classes as opposed to on the mistreated classes. PIL looking for request to boycott Quran38 transmission of T.V. Serials[39] , execution of Consumer Protection Law[40] expulsion of degenerate ministers[41], nullification of sporadic distribution of petroleum pump[42] and government accommodation[43] indictment of lawmakers and officials for tolerating rewards and Kickbacks through Hawala transactions[44], better administration states of the

35. AIR 1987 SC 1087
36. (2000)4 SCJ 261
37. *Ashok kumarpandey vs state of west Bengal* (2004) 3 SCC 349
38. Chandanmal chopravs state of west Bengal AIR 1986 Cal 104
39. *Oddessey LokvidyayanaSangathanVs Union of India* (1988) ISCC 168
40. *Common Cause Vs Union Of india* (1996) 2 SCC 752
41. D. Satyanarayanvs N.T. Rama Rao AIR 1988 AP 144
42. Centre for Public Interest Litigation Vs Union O india (1995) supp 3 SCC 382
43. *Shiv sagartiwariVs Union of India* (1996) 2 SCC 558
44. *Vineet Narayan Vs union Of india*(1996) 2 SCC 199

individuals from bring down judiciary[45] choice of college teachers[46] are some unmitigated cases embracing working class interests. Some underlining achievements of PIL, anyway can't affirm that it should dependably remain a successful instrument tor insurance of Human Rights the fate of PIL will rely on who utilizes it and for whom.

The Supreme Court: additionally, demands that the spill prerequisites that spill Out , les 21 and 22 (l) of the Indian Constitution are to be entirely taken of Al-tic These would apply with break even with power to other Government offices including the Directorate of Revenue Intelligensssce, Directorate of offices Enforcement, Coast Guard, Central Reserve Police Force (C.R.P.F), Border Security Force (B.S.F.) the Central Industrial Security Force (C.I.S.F), the state, Armed Police, knowledge Agencies, for example, the Intelligence State Bureau, RAW, Central Bureau of Investigation (C.B.I.) and C.I.D. These rules are just a couple out of countless of the zenith court in which the court maintained the human privileges of the abused people.

4) Media and Human Rights

The Information Media is an important arm of any modem democratic polity through which the people exercise their freedom of information. The freedom of information, the democratic right to know, is crucial in making all other human rights effective and providing an important safeguard for the enjoyment of all those rights. Traditionally, the vehicle of public information was the Press. Today it is called the media, which include the press, the radio, the television and the internet. The "Fourth Estate" plays a crucial role in a large democracy like India where about 1500 different types of newspapers are circulated.

The period of National emergency saw, for the first time, the gagging of the free press. Many of them depended on the BBC for impartial news about India. It is no wonder that the freedom or the Press, a watchword after emergency. Disposing or a case of contempt of newspapers, the Supreme Court remarked as follows:

It is the duty of a true and responsible journalist to provide the people with accurate and impartial presentation of news and his views after dispassionate evaluation of facts and information received by him and to be published as a news item. The editor of a newspaper or a journal, the court said, has a greater responsibility to guard against untruthful news and its publication. If the newspaper publishes what is improper, mischievously false or illegal and abuses its liberty, it must be punished by a court of law. While a free and healthy press is indispensable to the functioning of a true democracy, the court said, "the freedom of the press is subject to reasonable restraint."[47]

Since the 1970's the media in India have played a central role in sensitising people with information about governance, development, science and technology, foreign relations and so on. However, of late it has also come in for criticism, as highlighted by the above Supreme Court decision. There has been a decline in journalistic credibility, as noted by the Chairman of the Press Council of India himself in a seminar.[48] Senior journalists feel that the media shies away from important 'people's issues' like tribal issues, that it is losing social content and becoming a consumer product with a manager overshadowing the editor.[49]While the media is "a vital average to keep the rulers in check." It has failed to educate people to assert their claim to the right to information." Observes another senior journalist.[50]The press also has come in for rough treatment by terrorists, insurgents, and some individual politicians. The Chairman of the Press Council condemned increasing commercialism and corrupt practices emphasizing the need to arrest them. The media also has a tendency to launch "trials by the media." Even sentencing by the media, even while a court proceeding is underway. Considering the totality of the impact of the media during the past two decades, despite the above pitfalls, one must recognise that the contribution of the media ii revealing and highlighting human rights causes has been most impressive. A colonial law relating to official secrecy, the Official Secrets Act. 1923, however, remains an impediment in the effective exercise of the freedom of information.

THE PROTECTION OF HUMAN RIGHT ACT, 1993: WHAT AND WHY

Keeping in mind the end goal to meet national also worldwide interest for the constitution of National

45. *All India judge association vs Union of India*, AIR 1992, SC 165
46. *Biswajeet Serisha vs Dibrugarh University* AIR 1991GAU27
47. Media Full of Trivia, says Press Council Meet, The Indian Express (17 November 1996)
48. Inderjeet, Member, Press Council Of India, The Indian Express (17 November 1996): 8.
49. V. N Narayan, Editor, the Hindustan Times in a seminar on Roght to Information, New Delhi, The Hindu. (November 2. 1996): 3.
50. Subs by Act 43 of 2006 for "The national Commission for Schedule Caste and Schedule Tribes".

Human Rights Commission, State Human Rights Commissions in States and Human Rights Court for better security of human rights and for issues associated therewith or accidental thereto, the Human Rights Commission Bill, 1993 was presented in the Parliament on 14 May, 1993. Pending this Bill in the Parliament, the President of India proclaimed an Ordinance, i.e., "*The Protection of Human Rights Ordinance, 1993*", on 28th September 1993 under article 123(1) of the Constitution. In this way the Ordinance progressed toward becoming as The Protection of Human Rights Act, 1993. The Act is considered to have come into compel on 28th September 1993, i.e., the date when The Protection of Human Rights Ordinance was declared. It reaches out to the entire of India. In any case, it should apply to the State of Jammu and Kashmir just in so far in accordance with the issues relatable to any of the passages counted in List I or List II in the Seventh Schedule to the Constitution as relevant to that State. National Human Rights Commission is constituted as follows:

(1) The Central Government shall constitute a body to be known as the National Human Rights Commission to exercise the powers conferred upon, and to perform the functions assigned to it, under this Act.

(2) The Commission shall consist of :

a) A Chairperson who has been a Chief Justice of the Supreme Court;

b) One Member who is or has been, a Judge of the Supreme Court;

c) One Member who is, or has been, the Chief Justice of a High Court;

d) Two Members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights.

(3) The Chairperson of the National Commission for Minorities,[51] the National Commission for the Scheduled Castes, National Commission for the Scheduled Tribes, and the National Commission for Women shall be deemed to be Members of the Commission for the discharge of functions specified in clauses(b) to (j) of section12

(4) There shall be a Secretary-General who shall be the Chief Executive Officer of the Commission except[52] judicial functions and the power to make regulations under

(5) Commission and shall exercise such powers and discharge such functions of the section 40(B), as may be delegated to him by the Commission or the Chairperson as the case may be.

(6) The headquarters of the Commission shall be at Delhi and the Commission may, with the previous approval of the Central Government, establish offices at other places in India.

a) APPOINTMENT

(1) The Chairperson and the Members53 shall be appointed by the President by warrant under his hand and seal;

Provided that every appointment under the sub-section shall be made after obtaining the recommendations of a committee consisting of

a)The Prime Minister - Chairperson

b)Speaker of the House of the People - Member

c)Minister in-charge of the Ministry of Home Affairs in the Government of India - Member

d)Leader of the Opposition in the House of the People - Member

e)Leader of the Opposition in the Council of States - Member

f)Deputy Chairman of the Council of States - Member

Provided further that no sitting Judge of the Supreme Court or sitting Chief Justice of a High Court shall be appointed except after consultation with the Chief Justice of India.

(2) No appointment of a Chairperson or a Member shall be invalid merely by reason of any vacancy of any member in the Committee referred to in the first proviso to sub- b) Commission: Functions

The Commission shall perform all or any of the following functions, namely:

(a) Inquire, Suo-moto or on a petition presented to it by a victim or any person on his behalf [or on a direction or order of any court][54] , into complaint of:

1. violation of human rights or abetments thereof; or

2. negligence in the prevention of such violation, by a public servant;

(b) Intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court;

(c) Visit, notwithstanding anything contained in any other law for the time being in force, any jail or other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection, for the study of the living conditions of the inmates

51. Subs by Act 43 of 2006 for "as it may delegate to him"
52. Subs by Act 43 of 2006 for "other members"
53. section (1).
54. Inserted by Act 43 of 2006.

thereof and make recommendations thereon to the Government;[55]

(d) Review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;

(e) Review the factors, including acts of terrorism that inhibit the enjoyment of human rights and recommend appropriate remedial measures;

(f) Study treaties and other international instruments on human rights and make recommendations for their effective implementations;

(g) Undertake and promote research in the field of human rights; (h) Spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means;

I. Encourage the efforts of non-governmental organisations and institutions working in the field of human rights;

II. Such other functions as it may consider necessary for the protection of human rights.

c) Inquiries:Power

1) The Commission shall, while inquiring into complaints under this Act, have all the powers of a civil court trying a suit under the Code of Civil Procedure , 1908, and in particular in respect of the following matters, namely;

Summoning and enforcing the attendance of witnesses and examining them on oath;

a) discovery and production of any documents;

b) receiving evidence on affidavits;

c) requisitioning any public record or copy thereof from any court of office;

d) issuing commissions for the examination of witnesses or documents;

e) Any other matter which may be prescribed.

2) The Commission shall have power to inquire any person, subject to any privilege which may be claimed by that person under any law for the time being in force, to furnish information on such points or matters as, in the opinion of the Commission, may be useful for, or relevant to, the subject matter of the inquiry and any person so required shall be deemed to be legally bound to furnish such information within the meaning of section 176 and section 177 of the Indian Penal Code.

3)The Commission or any other officer, not below the rank of a Gazetted officerspecially authorised in this behalf by the Commission may enter anybuilding or place where the Commission has reason to believe that any document relating to the subject matter of the inquiry may be found and may seize any such document or take extracts or copies therefrom subject to the provisions of the Code of Criminal Procedure, 1973, in so far as it may be applicable.

4.) The Commission shall be deemed to be a civil court and when any offence as is described in section 175, section 178, section 180 or section 228 of the Indian Penal Code is committed in the view or presence of the Commission, the Commission may, after recording the facts constituting the offence and the statement of the accused as provided for in the Code of Criminal Procedure, 1973, forward the case to a Magistrate having jurisdiction to try the same and the Magistrate to whom any such case is forwarded shall proceed to hear the complaint against the accused as if the case has been forwarded to him under section 346 of the Code of Criminal Procedure, 1973. 5) Every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code, and the Commission shall be deemed to be a civil court for all purposes of section 195 and Chapter XXVI of the Criminal Procedure, 1973.

6) Where the Commission considers it necessary or expedient so to do, it may, by order, transfer any complaint filed or pending before it to the State Commission of the State from which the complaint arises, for disposal in accordance with the provisions of this Act; Provided that no such complaint shall be transferred unless the same is one respecting which the State Commission has jurisdiction to entertain the same[56]

7) Every complaint transferred under sub-section

6) shall be dealt with and disposed of by the State Commission as if it were a complaint initially filed before it.[57]

State Human Rights Commission

The Protection of Human Rights Act of 1993 provides for the creation of State Human Rights Commission at the state level. A State Human Rights Commission can inquire into violation of human rights related to subjects covered under state list and concurrent list in the seventh schedule of the Indian constitution.

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55. Subs by Act 43 of 2006
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for the creation of State Human Rights Commission at the state level. A State Human Rights Commission can inquire into violation of human rights related to subjects covered under state list and concurrent list in the seventh schedule of the Indian constitution

Composition

Human Rights (Amendment) Act, 2006 consists of three members including a chairperson. The chairperson should be a retired Chief Justice of a High Court.

The other members should be:

(i) A serving or retired judge of a High Court or a District Judge in the state with a minimum of seven years' experience as District judge.

(ii) A person having practical experience or knowledge related to human rights.

The Governor of the state appoints the chairperson and other members on the recommendations of a committee consisting of the Chief Minister as its head, the speaker of the Legislative Assembly, the state home minister and the leader of the opposition in the Legislative Assembly. The chairman and the leader of the opposition of legislative council would also be the members of the committee, in case the state has legislative council.

The tenure of the chairperson and members is five years or until they attain the age of 70 years, whichever is earlier. After the completion of their tenure, they are not eligible for any further employment under the state government or the central government. However, chairman or a member is eligible for another term in the commission subject to the age limit.

Functions of The Commission

According to the protection of Human Rights Act, 1993; below are the functions of State Human Rights Commission:

(a) Inquire suomotu or on a petition presented to it, by a victim, or any person on his be into complaint of violation of human rights or negligence in the prevention of such violation by a public servant.

(b) Intervene in any proceeding involving any allegation of violation of human rights before a Court with the approval of such Court.

(c) Visit any jail or any other institution under the control of the State Government where persons are detained to study the living conditions of the inmates and make recommendations there on

(d) Review the safeguards provided by or under the constitution of any law for the time being in force for the protection of human rights and recommend measures for their effective implementation.

(e) Review the factors, including acts of terrorism that inhibit the enjoyment of human rights and recommend appropriate remedial measures.

(f) Undertake and promote research in the field of human rights.

(g) Spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights.

(h) Encourage the efforts of Non-Governmental organizations and institutions working in the field of human rights.

(j) Undertake such other functions as it may consider necessary for the promotion of human rights.

Working of the Commission

- The commission is vested with the power to regulate its own procedure.
- It has all the powers of a civil court and its proceedings have a judicial character.
- It may call for information or report from the state government or any other authority subordinate there to.

It has the power to require any person subject to any privilege which may be claimed under any law for the time being in force, to furnish information on points or matters useful for, or relevant to the subject matter of inquiry. The commission can look into a matter within one year of its occurrence.

CONCLUDING REMARK

Since, India is the largest democracy of the world but unfortunately in our country there are innumerable cases of human rights violations are being reported in every annual report of national human rights commission from various states. In spite of this fact we have human right commission at national level, at state levels and even at district level but the frequent violations of human rights are taking place in entire country. This is due to various social economic and political reasons but the most considerable reason is our human right commission don't have explicit power to take action on its own accord but have only power to recommend after making inquiries into the matters related to human rights violations. Secondly, due to poverty and illiteracy our Indian people even are not very much aware about their own human rights which they possessed. At last but not least our enforcement agencies like police, vigilance and other administrative agencies are not fully equipped with the means to tackle with the like situations of

human rights violations. NGO,S are playing a very vital and effective role regarding the implementation of human rights values not merely in India but also in all the parts of the world where gross violations of human rights are taking place.

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SECULARISM AND CONSTITUTION OF INDIA: A COMPREHENSIVE STUDY ABOUT IT

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ABSTRACT

India is the place of major world religions: Hindu, Muslim, Jain, Buddhist, Sikh etc. India is one of the most diverse nations in terms of religion. It is an indubitable fact that hundreds of millions of Indians belonging to diverse religions lived in comity through the ages, marred through at times by religion revolts, economic exploitation and social suppression being often at the bottom of it all. The core ethos of India has been a fundamental unity, tolerance and even synthesis of religion. Many scholars and intellectuals believe that India's predominant religion, Hinduism has long been a most tolerant religion. India is a country built on the foundations of a civilization that is fundamentally non-religious. From Constitutional perspective we can say that India is really a secular country. "A Secular State deals with the individual as a citizen, irrespective of his religion, is not connected to a particular religion nor does it seek to promote or interfere with religion. Secular State must have nothing to do with religious affairs except when their management involves crime, fraud or becomes a threat to unity and integrity of the State."

-Justice Desai

Key words: Secularism, Secular State, foundations of a civilization, religions.

INTRODUCTION

Secularism or Secular State means "a State, which doesn't recognize any religion as State religion, but treats all religions equally." The word 'secular' was inserted into the Preamble of the Constitution by 42nd Constitutional Amendment Act, 1976, but concept of secularism was already implicit in the Constitution in granting "liberty of ….. belief, faith and worship through the Preamble".

The basic feature of the secularism was explained by the Supreme Court which held that, secularism means "the State shall have no religion of its own and all persons of the country shall be equally entitled to the freedom of their conscience and have the right freely to profess, practice and propagate any religion."

The Supreme Court has observed that although the words 'secular state' are not expressly mentioned in the Constitution, but there can be no doubt that Constitution makers wanted to establish such a State and accordingly Arts. 25-28 have been included in the Constitution. [1] Secularism has a positive meaning that is developing, and understanding respect towards different religions.

The unity and fraternity of the people of India, professing numerous Faiths, has been sought to be achieved by enshrining the ideal of a 'Secular State' which means that the State protects all religions equally and does not itself uphold any religion as the State religion. [2]

According to M.H. Beg, "*the secular State, rising above all differences of religion, attempts to secure the good of all its citizens irrespective of their religious beliefs and practices. It is neutral or impartial in extending its benefits to citizens of all castes and creeds*".

Concept of Religion in India:

To understand the concept of secularism in respect of constitutional philosophy first we have to understand the term "RELIGION".[3] In general sense, Religion is a system of faith and worship of supernatural force which ordains regulates and controls the destiny of human kinds.

1. *St. Xavier College v. State of Gujarat*, AIR 1974 SC 1389
2. *Aruna Roy v. Union of India* AIR 2002 SC 3176
3. http://www.legalservicesindia.com/article/1964/Secularism-and-Constitution-of-India.html

According to Merriam Webster dictionary, ''Religion as an organized system of faith and worship, a personal set of religious belief and practice, a cause, principle or belief held to with faith and order".

According to Swami Vivekananda, "It is based on faith and belief and in most cases consists only of different sect of theories…" Dr.RadhaKrishan, ''*The main aim of the Hindu faith is to permit image worship as the means to the development of the religious spirit to the development of the supreme who has his temples in all beings*".

From these definitions we can conclude that no universally acceptable definition as to what exactly religion is. There appears to be near unanimity that religion, generally, is a belief or faith in the existence of a supernatural being and the precepts which people follow for attaining salvation.

Secularism

Secularism – does not mean atheist society. – It is now well settled:-

i. The Constitution prohibits the establishment of a theocratic state;

ii. The Constitution is not only prohibited to establish any religion of its own but is also prohibited to identify itself with or favoring any particular religion;

iii. The secularism under the Indian Constitution does not mean Constitution of an atheist society but it merely means equal status of all religion without reference in favour of discrimination against any of them. (*Gopala Krishnan Nair v. State of Kerala,* AIR 2005 SC 2053.).

In *Aruna Roy v. Union of India*,[4] the Supreme Court has held that the word "Religion" has different shades and an important shade is duty towards the society[5]. The word "Secularism" means developing understanding and respect for different religions.[6] Secularism is thus susceptible to this positive meaning and is basic feature of the Constitution.[7]

Dr. Radhakrishnan, former President of India, has in his book Recovery of Faith, page 184, explained secularism in this country, as follows: - "When India is said to be a Secular State, it does not mean that we reject the reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that secularism itself becomes a positive religion or that the State assumes divine prerogatives… We hold that not one religion should be given preferential status… This view of religious impartiality, or comprehension and forbearance, has a prophetic role to play within the National and International life".

Donald E. Smith, Professor of Political Science in Pennsylvania University provided what he regarded as a working definition of a secular state.[8] This was in his book India as a Secular State. "The secular State is a State which guarantees individual and corporate freedom of religion, deals with the individual as a citizen irrespective of his religion, is not constitutionally connected to a particular religion, nor does it seek to promote or interfere with religion".

The definition given by Smith reflects three aspects of secularism in the form of inter-related relations as:

- Religion and Individual
- Individual and State
- State and Religion

These relations can be comprehensively elaborate by this triangle. These three associates are the three sides of a tri-angle, touching each other necessarily at three points and creating their mutually related angles. These three sets of angular relationship contain the total of religious freedom available in a society.

First of all these three angles, reflects the relationship between the religion and individuals. This relation contains' positive freedom of religion' which implies 'reasonable unrestrained liberty of believing & practicing one's religion.' In other words, every person should be free to follow any religion, and to act upon its teachings and reject all other without any interference from the state. Religious freedom is the soul of principle of liberty enshrined in the Preamble to the Constitution of India.

The second angular relation reflects the relationship between the state and individual. It contains 'negative freedom of religion.' By 'negative freedom of religion' mean 'absence of restrains, discriminations, liabilities and disabilities which a citizen might have been otherwise subject to.'

4. AIR 2002 SC 3176.
5. Ibid., p. 3191.
6. Ibid., p. 3200 (Dharmadhikari J.).
7. Ibid., p. 3195
8. http://www.legalserviceindia.com/articles/ct.htm

The third angular relation which emanates from the relationship between the state and its religion. It contains 'neutral freedom of religion.' It implies that state has no religion of its own and attitude of indifference towards all the religions by the state.

Secularism as contemplated by the Constitution of India has the following distinguishing features: [9]
(1) The state will not identify itself with or be controlled by any religion;
(2) While the state guarantees to everyone the right to profess whatever religion one chooses to follow, it will not accord any preferential treatment to any of them.
(3) No discrimination will be shown by the state against any person on account of his religion or faith.
(4) The right of every citizen, subject to any general condition, to enter any offices under the state and religious tolerance form the heart and soul of secularism as envisaged by the constitution. It secures the conditions of creating a fraternity of the Indian people which assures both the dignity of the individual and the unity of the nation.
Most important components of secularism are as under:-
i. Samanata (equality) is incorporated in Article 14;
ii. Prohibition against discrimination on the ground of religion, caste, etc., is incorporated in articles 15 and 16;
iii. Freedom of speech and expression and all other important freedoms of all the citizens are conferred under articles 19 and 21;
iv. Right to practice religion is conferred under Articles 25 to 28;
v. Fundamental duty of the State to enact uniform civil laws treating all the citizens as equal, is imposed by Article 44;
The term "religion" has not been defined in the Constitution of India. Actually it is hardly susceptible to any rigid definition. In a case the Supreme Court has observed that religion is a matter of faith with individuals or communities. Religion is not necessarily theistic. The religion, may lay down a code of ethical rules for its followers to accept and also prescribe rituals. Ceremonies and modes of worship which are regarded as integral parts of religion. [10]

India is a country of religions. There exist multifarious religious groups in the country but, in spite of this, the Constitution stands for a secular state of India. The object of insertion of the concept of "secularism" in the Preamble was to spell out expressly the high ideas of secularism and the compulsive need to maintain the integrity of the nation which are subjected to considerable stresses and strains, and vested interests have been trying to promote their selfish ends to the great detriment of the public good. [11]

Art. 14 of the Constitution prohibits the State from discriminating on the ground of religion.
Art. 15 prohibits the State from making any laws, any discrimination on the ground of religion in the public places.

Similarly, Art. 16 prohibits discrimination of any opportunity of employment or promotion.
Art. 17 states that "Untouchability" is abolished and its practice in any form is forbidden.
According to Art. 23 (2), State may impose compulsory service for public purpose, but cannot discriminate on the ground of religion.
Art. 25 tells regarding the freedom of conscience and free profession, practice and propagation of religion. Article 25 (1) guarantees to every person the freedom of conscience and right to profess, practice and propagate religion. The right guaranteed under Art. 25 (1) like other constitutional rights, is not absolute. This right is, subject to public order, morality and health to the other provisions of Part III of the Constitution. Also, under sub-clauses (a) and (b) of clause (2) of Article 25 the State is empowered by law-
a) To regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practice;
b) To provide for (i) social welfare and reform, and (ii) to throw open Hindu religious institutions of a public character to all classes and sections of Hindus.
Art. 26 tells regarding the freedom to manage religious affairs. According to Art. 26, subject to public order, morality and health, every religious denomination or any section thereof shall have the right-
i. To establish and maintain institutions for religious and charitable purposes;
ii. To manage its own affairs in matters of religion;
iii. To own and acquire movable and immovable property; and
iv. To administer such property in accordance with law.
'Religious denomination' must satisfy three requirements:
The Hon'ble Supreme Court while considering the freedom to manage religious affairs under Art.26

9. http://www.legalservicesindia.com/article/1964/Secularism-and-Constitution-of-India.html
10. Commr. H. E. R. v. L. T. Swamiar, AIR 1954 SC 282.
11. *M. P. Gopalakrishnan Nair v. State of Kerala*, (2005) 11 SCC 45: AIR 2005 SC 3053.

held that, expression 'religious denomination' must satisfy three requirements, i.e.,

i. That it must be a collection of individuals, who have a system of belief or doctrine which they regard as conductive to their spiritual well-being, i.e., a common faith;

ii. A Common Organization and

iii. Designation of A Distinctive Name.

It necessarily follows that the common faith of the community should be based on religion and in that they should have common religious tenets and the basic cord which connects them, should be religion and not merely considerations of caste or community or societal status. [12]

Art. 27 tells regarding the freedom as to payment of taxes for promotion of any particular religion. According to Art. 27, no person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

Art. 28 tells regarding the Prohibition of Religious Instruction in State-aided Institution. Article 28 mentions four types of educational Institutions:

a.Institutions wholly maintained by the State.

b.Institutions recognized by the State.

c.Institutions that are receiving aid out of the State fund.

d.Institutions that are administered by the State but are established under any trust or endowment.

In the Institutions of (a) type no religious instructions can be imparted. In (b) and (c) type institutions religious instructions may be imparted only with the consent of the individuals. In the (d) type institution, there is no restriction on religious instructions.

Art. 29 (2) states that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Art. 30 tells regarding the right of minorities to establish and administer educational institutions.

Article 44 requires the State to secure for the citizens

Uniform Civil Code Throughout The Territory Of India.

In a historic judgment in *Sarla Mudgal v. Union of India,* [13] the Supreme Court has directed the Prime Minister Narsimha Rao to take fresh look at Art. 44 of the Constitution which enjoins the State to secure a uniform civil code which, accordingly to the court is imperative for both protection of the oppressed and promotion of national unity and integrity. The Court directed the Union Government through the Secretary to Ministry of law and Justice, to file an affidavit by August 1995 indicating the steps taken and efforts made, by the Government, towards securing a uniform civil code for the citizens of India.

But, unfortunately, the Government has not taken any step and it was declared by the Hon'ble Supreme Court in Lilley's case [14] that the direction issued by Supreme Court in Sarla Muudgal, was only an obiter dicta and not legally binding on the Government.

According to Art. 324, the election of House of People (Lok Sabha) & Legislative Assemblies of State are done by voting by citizens of India, who have attained 18 years age irrespective of religion, race, caste, or sex, unless he is disqualified under the Constitution or any law on the grounds of non-residence, unsoundness of mind, crime, or corrupt or illegal practice.

According to Art. 325, there shall be one general electoral roll for every territorial constituency for election to either House of Parliament or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them. No person shall be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex.

The constitutional aspiration and scheme for secularism is elaborately supported by legislative measures. Chapter XV of the Indian Penal Code, 1860 contains five important sections dealing with offences relating to religion.

Offences Against Religion Under IPC

a) Injuring or defiling place of worship with intent to insult the religion of any class:-

According to Section 295 of IPC, whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons, or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an

12. *Nellor Marthandam Vellalar v. Commissioner, Hindu Religions and Charitable Endowments* (2003) 9 ILD 667 (SC).
13. (1995) 3 SCC 635.
14. *Lilley Thomas v. Union of India,* AIR 2000 SC 1650.

insult to their religion, shall be punished with imprisonment up to two years, or with fine, or with both.

b) Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its:

Religion or Religious Beliefs

According to Section 295-A of IPC, whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment up to three years, or with fine, or with both.

c) Disturbing Religious Assembly

According to Section 296 of IPC, whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship, or religious ceremonies, shall be punished with imprisonment up to one year, or with fine, or with both.

d) Trespassing on burial places, etc.:-

According to Section 297 of IPC, whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby; commits any trespass in any place of worship or on any place of sepulcher, or any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished with imprisonment up to one year, or with fine, or with both.

e) Uttering, words, etc. with deliberate intent to wound the religious feelings of any person:-

According to Section 298 of IPC, whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment up to one year, or with fine, or with both.

CONCLUSION AND SUGGESTION

Considering the various constitutional provisions and legislative provisions, we can say that India is a Secular State. The ideals of secular state have clearly been embodied under the Indian Constitution and the provisions are being implemented in substantial measure.[15] But the circumstances after independence have posed a challenge before secularism of India for a number of times. Sometimes it is also alleged that by Uniform Civil Code, the existence of minorities in India is in danger or it is an assault on the identity of minorities. India being still a traditional society that contains not one, but many traditions owing their origin in part to the different religions that exist here. While India carries with it many traditions it has managed to retain the secular character of its polity, while in many countries especially from the third world, a secular authority has crumbled in face of conflicting traditions. Secularism in India is dictated also by long term considerations for the good of the community. Any other policy in the context of our history and our diverse religions might not be conducive to the progress of the country. The whole social fabric is likely to be weakened if the State were to interfere actively in religious matters. In a positive sense too, secularism alone can preserve harmony in our society and make the fellow feelings of Indians a possible reality.

In sum up, it can be said that India is keeping its notions of secularism properly. Clearly the judiciary in India is a significant site where contests under the banner of secularism have been taking place over the last fifty and odd year. Though the judiciary is trying to strike the balance in a harmonious way but the people of India should not forget the dream of framers of the constitution and the ancient philosophy of 'Sarva Dharma Sama Bhava'. Undoubtedly it can be said that the legislature, the executive and the judiciary have all been making continuous efforts to strengthen and sustain secularism in India.

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15. http://www.legalserviceindia.com/articles/ct.htm

IMPOSSIBILITY IN ATTEMPT

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ABSTRACT

No aspect of the criminal law is more confusing and confused than the common law of impossible attempts.

JOSHUA DRESSLER

With regard to attempt, it may be said that there may be a crime where the whole of actus reus that was intended has not been consummated. But, the liability begins only when the offender has done some act, which not only manifests mens rea, but goes to some extent in carrying it. As long as crime lies in the mind it is not punishable, because mere criminal thoughts do not guarantee an act of crime. They might not be executed. What constitutes the offence of criminal attempt is a mixed question of law and fact. It depends largely upon the circumstances of the particular case.Attempt defies a precise and exact definition. Impossibility in attempt being a major area of criminal law which needs more clarification and precision. Thus, an effort has been made to bring forth the anomalies in the law of Impossible attempts and to suggest some possible solutions to the same.

Key words: Criminal Thoughts , Criminal Law, The Law of Impossible Attempts, Impossible Attempts.

INTRODUCTION

An important problem in the law of attempt can be perceived in the form of impossible attempts i.e. when the accused tries to commit crimes which are impossible to accomplish. With regard to the nature of impossible attempt, Stephen J. once said that the drafting of a statute should aim at a degree of precision which a person reading in bad faith cannot misunderstand; and it is all better of he cannot pretend to misunderstand it.[1] Courts and criminal law commentators have struggled for generations over the question whether an accused should be punishable for attempt when, for reasons unknown to the defendant, the intended offense could not possibly be committed successfully under the particular circumstances.

The defense of impossibility with regard to attempt crimes applies to those instances where a defendant's action could not possibly result in the commission of underlying crime. The crime is not prevented by some intervening event, such as detection by the authorities, nor is it prevented only by some accident, such as firing a gun at the intended victim but missing. Impossibility is raised as a defense when the crime is not committed because, given the factual or legal context, it was impossible for the action to have resulted in the commission of the intended principal crime.

But before tackling these intricate problems of impossible attempts, it may be of interest to note that until the time of Feurbach[2] 'impossible attempts' were not treated as punishable because they were held to be on the footing of mere preparation or of mere intention. Therefore, in *Q v. Collins* [3] it was held that if the persons puts his hand in the pocket of another with the intention of steal but the pocket was empty, he could not be convicted for an attempt to steal. So also in *R v. McPherson* [4] it was held that a person could not be properly convicted of breaking and entering a building and attempting to steal goods which were not there. However, all these cases were reviewed in *R v. Brown* [5] where Lord Coleridge declared that these cases were decided on a mistaken view of the law. Finally in *R v. Ring* [6] the accused was convicted for an attempt to steal from the pocket of a woman, though the pocket was empty, and all the cases to contrary which have been noted above, were overruled, though no reason was given for this decision.

Suppose a man, believing a block of wood to be his

1. Glanville Williams, "The Lords and Impossible Attempt", 45 C.L. J. 33 (1986).
2. Syed Shamshul Huda, Principles of Law of Crimes in British India 231(1982).
3. (1864) 168 E.R. 1477.
4. (1857) 7 Cox 281.
5. (1889) 24 Q.B.D. 357.
6. (1892) 17 Cox C.C 491.

deadly enemy, struck it with a blow intending to murder, could he be convicted of attempting to murder the man he took it to be? Or could someone be convicted of attempted theft if he took an umbrella which was in fact his, believing it to belong to someone else? These hypothetical cases might be distinguished from *R v. Ringon* the ground that in neither of them would the accused have taken what from the objective point of view of a reasonable man, could be regarded as a step towards the commission of a crime in question. This point is answered by Rowlatt J. [7] by saying that the accused in such cases is not on the job although he thinks he is. In this case D had sent some pills to a pregnant woman in order to cause an abortion. She took them, but they appeared to be innocuous. D was tried for attempting to administer a noxious thing to the woman. He was held not to be guilty as he had attempted nothing. The learned Rowlatt J. observed:

It is well known that the impossibility of a thing does not prevent an attempt being made. If you try to burst open the very best kind of steel safe with a wholly insufficient instrument, you are still guilty of an attempt, although you never could have completed it because you are at the very thing and trying to do it. But where a man is never on the thing itself at all, it is not a question of the impossibility, he is not on the job; if he fires his gun at a stump of a tree thinking it is his enemy and his enemy his miles away, and there is nobody in the field at all, he is not near enough to the job to attempt it; he has not begun it; he has done it all under a misapprehension. If the thing was not noxious, though he thought it was, he did not attempt to administer a noxious thing by administering the innocuous thing. The real question is whether it was noxious.

However, some theories have been propounded to reconcile these inconsistencies. Firstly, it has been suggested that an impossible attempt is not punishable and therefore it is not an offence to shoot a shadow, to administer sugar mistaking it for arsenic or to try to kill a person by witchcraft. The impossibility, however in such cases is absolute not relative, so that it could not cover the case of an adequate dose of arsenic. But, is this theory is accepted in all these cases, it cannot be said that there is any want of evil intent or mens rea nor is there the actus reus lacking. The only ground on which this theory may be defended is that the act in such cases does not cause an alarm or sense of insecurity to the society. Since no consequence follows the act, a vast majority of such cases would remain undetected or unknown. Secondly, another theory that has been propounded to reconcile these cases has been to differentiate between cases where the object is merely mistaken and cases where the object is merely absent. Huda observes that the liability in each of the above cases is different. However, to understand it in a better way one has to look into the nature of impossibilities, which might occur/exist, while committing a prohibited act.

II NATURE OF IMPOSSIBILITY

Since sane men do not attempt what they know to be impossible it is assumed in all those cases that they were laboring under a mistake of some kind. The reason for impossibility of completing substantive crime ordinarily falls into two categories:

(1) Where the act if completed would not be criminal, a situation which is usually described as "Legal Impossibility" [8].

(2) Where the basic or substantive crime is impossible of completion simply because of some physical or factual conditions unknown to the defendant, a situation usually described as "Factual Impossibility".

Legal Impossibility or Where Objective is Not Criminal

The grounds for the defense of legal impossibility can be conceptually divided into two general categories i.e. (i) the intended result is not a crime [9] and (ii) the consummation of the intended crimes is rendered unattainable by virtue of some rule of law [10]. This distinction cannot be said to be semantic but conceptual. In the first category, the desired result is not prohibited, for example, to steal one's own goods from one's lawful possession. Therefore, an attempt to commit theft of owns goods are not crime. In the second category, although the final result may be a crime, a rule of law based upon policy or logic makes the crime legally impossible. [11] For example in a jurisdiction that presumes a fourteen year old boy is legally incapable of committing rape, the presumption prevents the commission of an attempt to have intercourse with a woman against her will.[12]

The defense of legal impossibility does not deny the

7. *R v. Osborn* (1919) 84 J.I 63.
8. *Booth v State of Oklahoma* (1964) 398 P.2d 863. (Court of Cri. App., Oklahoma).
9. Glanville Williams, Textbook on Criminal Law 224 (1983).
10. *State v. Taylor* , 133 SW 2d. 336 (1939).
11. The justice in allowing the defense of legal impossibility in the second category lies in the fact that the impossibility was a consequence of the conceptualization of the consummated crime and has the same legal effect as if the accused intended to achieve a result which is no crime at all.
12. *Foster v. Commonwealth,* 96 Va. 306, 31 S.E. 503 (1898).

existence of the accused evil intent or the occurrence of certain acts of the accused pursuant to that intent. Rather, the defense vitiates the criminality of the attempt if the final result would not be a crime or would be legally impossible to accomplish. Furthermore, if the defense of legal impossibility applies, the accused's failure to consummate his plan is irrelevant, despite the fact that an essential element of an attempt is the failure to achieve the anticipated result.

However, it seems that there are serious discrepancies among the views of different writers as to where, due to certain reason, act may not be criminal-can the person be tried for attempt? It is worthy to mention here that there is no authority under the law which states the exact position.

The House of Lords expressed a view in the case of Roger Smith[13]that a person cannot be convicted of an attempt to handle stolen goods if the goods had, unknown to him, come into the possession of the police, so that they ceased to be stolen. They said no attempt is committed as the act was lawful.

After this case it was said that the Common law on impossible attempt was impolite and irrational and therefore Criminal Attempt Act 1981 was enacted which stated under section 1(2) that "*A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible*." Despite the enactment of Criminal Attempt Act which clearly laid down that it makes no difference whether the attempted crime is possible or not the person with a knowledge doing an act will be guilty of attempt. Yet in *Ryan v Anderton*[14] Mrs. Ryan who was convicted of attempt to receive stolen good, though it was found that it was not stolen. Therefore the conviction was quashed by House of Lords, though the Lords never gave a satisfactory reason for the quashing of the conviction and how to reconcile the judgment with Criminal Attempt Act 1981.

Glanville Williams [15] criticizing the decision said that it is absurd to say that a person cannot be guilty of attempt where his act becomes lawful due to reason unknown to him. He say that the question here to be identified is whether the law of criminal attempt is or should be based on the supposed facts (plus the defendant's efforts to commit the crime acting on facts as he believed them to be), or whether it require and should require all or some of the forbidden elements to be actually or (in the case of future facts) potentially present. He called these two approaches as the 'putative fact theory' and 'actual fact theory'. [16]

In the case of *R. v Shivpuri* [17] the accused was convicted of attempting to wrongfully dealing with heroin by the Court of Appeal, though he has imported a harmless powder believing it to be heroin. He fails in his effort to consummate the crime by reason of mistake of fact and not mistake of law, and ought to be guilty of attempt. Similarly a person dealing in good wrongly believing to be stolen is on equal footing with person dealing with innocuous article wrongly believing to be heroin. A person who fails to consummate the crime, due to his mistake as to the fact is guilty of attempt.

Although on the foregoing argument, as is submitted there are difficulties of legal principles involve in these cases of impossibility as when if all which the accused person intended would, had it been done, constituted no substantive crime, it cannot be a crime under the name 'attempt to do'. But after the enactment of Criminal Attempt Act this argument has no ground. Legal impossibility cannot absolve a person from criminal liability as the reason for punishing attempt is to allow the investigative agency to intervene before the harm involve is caused and to control the dangerous conduct of a person. In all these cases there is existence or non-existence of a fact does not affect the criminal intent and these cases are no different from the cases where a person is trying to pick pocket an empty pocket.

Where Accused's Objective is Impossible to Achieve or "Factual Impossibility"

It was earlier thought at one time that there could be no conviction for an attempt to do an act which was impossible. This doctrine resulted from faulty understanding of *R. v. Mc Pherson* where the decision was simply that, where an indictment charged D with stealing specific goods, he could not be found guilty of stealing other goods. Further it was held in the case of *R. v. Collins* that a conviction to steal from a pocket must be quashed because the question whether the pocket was empty or not was not left to the jury. However in *R. v Brown and others* [18] the

13. (1975) A. C. 476.
14. (1985) A. C. 560.
15. Supra note 11 at 265.
16. Supra note 10 at 36.
17. (1985) 2 W. L. R. 476.
18. (1892) 61 L. J. M. C. 116.

Court of Crown held that Collin was no longer a law. In *R. v Ring* [19] it appeared that Ring and other man had were trying to pick pocket, but no evidence was adduced as to the pockets containing anything. The court convicted them and said that *Collin* has been overruled by *Brown*.

So where the defendant erroneously believing that the gun is loaded points it at his wife and pulls the trigger or if D attempts to poison P, using a dose which is far to week to kill anyone; in all these cases the thing attempted is impossible, yet a conviction for an attempt to commit it would be proper as in all these cases the accused fails to complete the crime because of his mistaken belief as to the existence of certain facts or situation.

Thus on the foregoing discussion, it is submitted that there is no real difficulties of legal principle involved in the cases of factual impossibility and the person is guilty of attempt in all these cases. The disallowance of this event as a defense is justified because in such cases the act, done in pursuance of an evil intent, presents a threat to the society. Also, contrary to the legal impossibility, the completed act, in cases of factual impossibility, would have constituted a punishable crime. Therefore, the ignorance of the accused as to the probability of his success does not vitiate the criminality of his attempt.[20] However, one justification for convictions in which factual and not legal impossibility is pleaded is termed as the "reasonable man test"[21]. Under this view, if the defendant has failed, but a reasonable man acting under the same circumstances might have expected his act to be a crime, the failure is attributed to factual or physical occurrences.

Impossible Attempts under Indian Penal Code

Another difficult area in the law relating to attempt is that of impossible attempt. The question here arises that whether impossible attempt is included under the provision of Indian Penal Code. If we study section 511 we cannot make out whether it talks about impossible criminal attempt or not, but the study of illustration to Section 511 shows that it is inclusive of impossible attempts. As the illustration goes:

(a) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box, that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

b) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section.

On reading of the illustrations it can be said that impossible attempts are covered, though there is confusion as the example only show that factual impossibility is covered but there is no reference as to the legal impossibility.

In India, there is no authority as to what will be the decision of the Indian Courts. In the *Asghar Ali Pradhan v Emperor* [22] , the appellant in order to cause miscarriage of the victim, administered her liquid of copper sulphate. He was stopped by the victim's father when she made noise. He was charged for an attempt to cause miscarriage. On investigation it was found that the copper sulphate administered to him was less in quantity than sufficient for causing miscarriage. The court here made a distinction as to the illustration provided in the section as what he wanted to do was impossible of commission. The court explained by giving an example where men intend to hurt another by administrating poison prepares and administers some harmless substance. He cannot be convicted of attempt to do so. So in this case also as the neither the liquid nor the powder being harmful, they could not have caused miscarriage. The conviction was set aside.

But in a similar case in Malaysia whose penal code is very similar to Indian Penal Code , in the case of *MunahBinte Ali v Public Prosecutor* [23] it was held that in an attempt to cause miscarriage it is not necessary that woman should be pregnant, if the accused is unaware of the fact. The court observed that the evidence clearly showed that it was the intention of the appellant to cause miscarriage and he could not have made attempt unless he believed the complainant to be pregnant. He is in exactly same position as the would-be pick-pocket who, believing that there is, may be something capable of being stolen in the pocket. The circumstances of the present case seem to be exactly covered by the illustration to s. 511 of

19. (1889) 24 Q. B. D. 357.
20. In cases of legal impossibility, the accused is ignorant either as to a rule of law which renders consummation of a specific crime incapable or as to the absence of prohibition on certain results. On the other hand, in cases of factual impossibility the accused is ignorant of the existence or absence of circumstances which are essential to the consummation of his plan.
21. Sayre, "Criminal Attempt", 41 Harvard Law Review 821 (1928).
22. AIR 1933 Cal 893.
23. (1958) 24 MLJ 159.

the Penal Code.

Thus, the problem of impossible attempts appears to defy solution and a close examination of the whole matter is, therefore, called for. [24]

However, dealing with the issue the Law Commission of India [25] has proposed the deletion of section 511 and insertion of a new Chapter VB entitled 'Of Attempt' consisting of the two sub sections 120C and 120D after Chapter VA dealing with 'Criminal Conspiracy' with a view to group inchoate crime together. The proposed section 120C gives a comprehensive definition of attempt as-

Section 120C. Attempt- A person attempts to commit an offence punishable by this Code, when-

(a) He with the intention or knowledge requisite for committing it does any act towards its commission;

(b) The act so done is closely connected with, and proximate to, the commission of the offence; and

(c) The act fails in its object because of facts not known to him or because of circumstances beyond his control.

Section 120D- Punishment for attempt- Whoever is guilty of an attempt to commit an offence punishable by this Code with imprisonment for life, or with imprisonment for a specified term, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life, or as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence or with both.

This proposal is an attempt to clear the uncertain law of attempts under the Indian Penal Code. However it is suggested that it would add clarity if sub-clause (b) is deleted and the rest retained. Whether the act is sufficient proximate or not is a question of fact which should be left to the courts to decide. Further revision of our law on the lines of Criminal Attempts Act, 1981 may help our courts to resolve the conflicts and strengthen the law of criminal attempt.However,till date there has been no clear cut distinction as to rule in cases of impossible attempts either by legislative enactment or in the judicial pronouncements which reflects the imperfection of our criminal justice system.

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24. Two different tests have been suggested by Prof. Sayre and Prof. Hall in this connection:Prof. Sayre says-"If from the point of view of a reasonable man in the same circumstances as the defendant, the desired criminal consequences could not expected to result from the defendant's act, it cannot endanger social interests to allow the defendant to go unpunished, no matter how evil may have been his intentions." According to Prof. Hall- "Attempt is not determined by reference to the actual facts in the external situation…In sum, the material facts referred to in the definition of criminal attempt are those supposed to exists by a person manifesting the requisite mens rea. Here, unlike the above situations there was a mistake of fact, and the crucial issue concerns mens rea.

25. Law Commission of India, 42nd Report on Indian Penal Code, (Ministry of Law) (1971).

VICTIM COMPENSATION AND RESTORATIVE JUSTICE

*Book Review by Amit Mehrotra**

Paramjit S. Jaswal, G.I.S. Sandhu, Upneet Lalli and Shilpa Jain (ed.), Victim compensation and Restorative Justice, Rajiv Gandhi National University of Law, Patiala, Twentyfirst Century Printing Press, 2016.

In today's world, the concept of restorative Justice has gained momentum. It has increased the public trust on the criminal justice system. Restorative justice has many benefits such as empowering the victim, reducing the rate of recommission of offence. It is an approach to justice that focuses on the needs of the victims of crime, instead of just satisfying abstract legal principles or punishing the offender. Restorative justice is not an alternative to punishment but an alternative form of punishment. It is the concept of healing or the collaborative unburdening of pain for the victim, offender, and community. By mere sentencing the guilty would not meet the ends of justice unless victim is suitably compensated. The 154th Law Commission Report on the Code of Criminal Procedure devoted an entire chapter to 'Victimology' in which the growing emphasis on victim's rights in criminal trials was discussed extensively. In pursuance of the recommendations of the Malimath Committee and 154th Law Commission of India Report, a comprehensive provision for victim compensation scheme has been inserted in Section 357 A of the Code of Criminal Procedure, 1973. While the award or refusal of compensation in a particular case may be within the Court's discretion, there exists a mandatory duty on the Court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation[1]. The idea of compensation to victim of any wrong is connected with the legal system in two ways: *firstly*, the legal system has to regulate the relationship between the victim and the wrongdoer; and *secondly*, it has to regulate the relationship between the victim and administration of justice.

The book is a compendium of 19 scholarly articles authored by various prominent law teachers and research scholars. It starts with the address delivered by Justice (retd.) S.N. Agarwal at International Conference on Victim Compensation and Restorative Justice wherein he emphasized that courts in India are although the courts of law and justice but little attention is paid to justice in way of compensation to the victim. It was emphasized that restorative justice is the need of the hour (p.2). Judgments of the Supreme Court of India on the provisions of compensation to grant justice to the victim of the crimes are discussed. Restorative justice can take place at any stage of criminal justice process and even at prisons [2] (p.11). The Indian judiciary has been struggling with growing offences and consequentially innumerable arrests, overcrowded jails, and ever increasing pending case files. It is highlighted that the status of women undertrial becomes specifically more precarious given her doubly disadvantage status in the society. The book reflects the role of prison administration to function in a curative and correctional manner.[3] The compendium of research articles suggests that there should be paradigm shift from punitive justice to restorative justice. The book through its article[4] talks about the Scheme of relief and rehabilitation of victims of rape and to set up relief funds for various forms of violence to women (p.89). Rape victims experience severe psychological trauma and every kind of support including emotional and psychological.

Overall the compilation of the book focuses on the scope of plea bargaining and existing law on the victim's right of compensation. The authors have made several recommendations for the protection of victim's right and stressed that victim rights can be inferred directly from preamble of the Constitution. It suggests that medical assistance is the first thing that victim of crime requires. India must enact a comprehensive law for reparation of riot victims

* Assistant Professor, National Judicial Academy, BHOPAL

1. *Suresh & Anr vs State Of Haryana* (2015)2SCC227
2. Reimagining Prisons: Restorative Justice and Some Issues for Indian Prisons
3. Karnataka Prisons 2009
4. Reparative Justice for violence against Women: A Comparative Study of State Schemes for Victim Compensation .
5. A Case for Statutory Reparations for Riot Victims in India
6. A Crime Victim's Right To Access Justice: An Analysis
7. Psychological and Legal Assistance to the Victims of Crime: A study

(p.164). A victim [5] should be informed about his or her rights and has a right to engage legal counsel. Where the offender fails to pay compensation to the victim, it is the duty of the State to take effective measures to provide financial compensation of the victims of crime[6] (p.103). The role of the State is to help victim's participation in the criminal trial so as to cope up with the psychological stress [7] (p. 147) .

The book, throws light on various aspects of victim compensation and restorative justice such as compensating and rehabilitating rape victims, proactive role of judiciary for protecting victim's right, scope of plea bargaining, Rights of victim's vis-a-vis offenders and international perspective to victim compensation. The book is an effort to reflect and examine all issues and way forward relating to provisions for victim compensation and restorative justice. The compendium expresses through its scholarly articles that restorative justice is different from the adversarial legal process and also from the civil litigation.

The book stresses to restore the confidence of victims in the criminal justice system. It emphasizes that apart from the accused's rights, criminal justice system should also be concerned with the protection of the victim's rights. It suggests that during trial it should be the duty of the court to ensure that victim does not feel humiliated at the hands of the defense lawyer.

The magnitude of pending trials and backlog of cases has led to formalization of the concept of plea bargaining in the criminal justice system. Two articles[8] discuss the concept and scope of plea bargaining in India and abroad. Plea bargaining not only undermines the public image of the judiciary but also subverts many of its values and erodes the value of presumption of innocence and right to trial [9] (p.186). It suggests that there is an urgent need to narrow down the scope of offences to which plea bargaining is applicable. Its application to economic crime in Nigeria has made mockery to the whole practice [10] (p.213). In the last article it is expressed that there is a lot of focus on the victims of various crimes like rape but there is a lack of dialogue with regard to victims of human rights abuses. There is a need to focus on the land rights of indigenous peoples who are often neglected and oppressed by the State.

In most of the articles, language used by the authors are lucid and easy to understand. The concepts about the victim compensation and restorative justice are well defined. To my view, this book is go- buy- read and gives a comprehensive idea about victim compensation and restorative justice. A comparative analysis of UK, US, Sweden and China on victim compensation with India is a value addition to the present domain of knowledge. It is emphasized that Domestic Compensation Scheme has certain demerits as victim is compensated monetary and not mentally [11] (p.62). Vengeance theory, retributive theory, utilitarian theory, reformative theory, deterrent theory, preventive theory and compensatory theory have also been discussed. There are analysis of the Indian Supreme Court pronouncements which add to the quality of the book. Stress has been laid to judicial precedents through which courts enhances and analyzes the idea of victim compensation and restorative justice in India. However, in view of glaring mismatch between international jurisprudence and India's current position, it suggests that judiciary must take more steps forward to revamp the criminal Justice System in favour of the victims (p.229) .

In general, the articles emphatically stress that victim should be offered greater protection and should be treated with care and affection so that they are able to rehabilitate themselves and recommended the reconciliation and restorative means of justice. The editors of the book have taken pains to make the articles worth reading. Overall, the book is a good compilation of the subject and has lucidly explains the notion of victim compensation and restorative justice. The book is useful for bench, bar and academia.

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8. Plea Bargaining without Sacrificing the Attainment of Justice in Nigeria: Lessons from Other jurisdictions: Also see Plea Bargaining in India and Abroad
9. Negotiating justice
10. Supra 8
11. Contemporary Outlook on Victim Compensation , Punitive Justice to Restorative Justice: Imperatives of Human Rights Jurisprudence

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References

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From website:-National Oceans and Atmospheric Administration (NOAA). 1995. Regional Perspectives: Indian Ocean. www.ncdc.noaa.gov /paleo.outreach /coral/sor/sor_indian.html , accessed on July 13, 2008.
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